



**ROLE OF JUDICIARY IN PROTECTION OF
CONSUMERS WITH SPECIAL REFERENCE
TO TELECOM INDUSTRY IN INDIA**

DISSERTATION

**Submitted In Partial Fulfillment Of The Requirements For The
Award Of The Degree Of**

Master of Laws

By

MOHD RAFIQ DAR

ROLL NO. 10 LLM 25

Enrl. NO. GE-2342

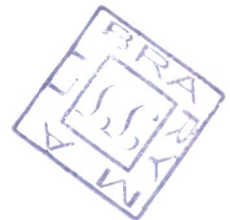
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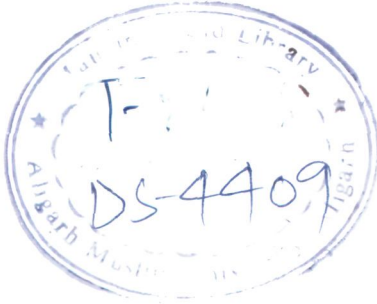
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**FACULTY OF LAW
ALIGARH MUSLIM UNIVERSITY
ALIGARH (INDIA)**

2012



DISSERTATION



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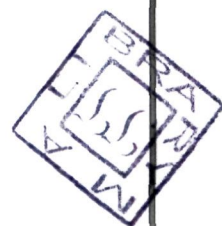
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**FACULTY OF LAW
ALIGARH MUSLIM UNIVERSITY
ALIGARH (INDIA)**

2012

DISSERTATION

**Dedicated
To
My
Loving Parents**



Dr. Javaid Talib

(Associate Professor)



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Certificate

It gives me pleasure to certify that **Mr. Mohd Rafiq Dar** bearing **Roll. No. 10LLM25, En. No. GE-2342**, has completed his *dissertation captioned* ***“ROLE OF JUDICIARY IN PROTECTION OF CONSUMERS WITH SPECIAL REFERENCE TO TELECOM INDUSTRY IN INDIA”*** under my guidance and supervision. To the best of my knowledge, the work is suitable for submission in partial fulfillment of the requirement of the award of the Degree of **Master of laws**.

I wish him success in every walk of life.



Dr. Javaid Talib

(Associate Professor)

DISSERTATION

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Mohd Rafiq Dar
Mohd Rafiq Dar

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ABBREVIATIONS

AC	Appeal Cases
ACC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
AIR	All India Reporter
ALL	Allahabad
ALL ER	All England Reporter
Anr	Another
Art	Article
Artt	Articles
ASCI	Advertising Standards Council of India
ASIC	Australian Securities Investment and Commission Act 2001
AD	Anno Domini
BC	Before Christ
BDS	Bachelor of Dental Surgery
B.Pharma	Bachelor of Pharmacy
BSNL	Bharat Sanchar Nigam Limited
CDMA	Code Division Multiple Access

C.J.	Chief Justice
COAI	Cellular Operators Association of India
CPA	Consumer Protection Act, 1986
CPJ	Consumer Protection Journal
CPR	Consumer Protection Reporter
CPSC	Consumer Product Safety Commission
Cr. LJ	Criminal Law Journal
DND	Do Not Disturb
DoT	Department of Telecommunications
ed	Edition
Etc	etcetra
EU	European Union
FAX	Frequent Access Xerox
FTC	Federal Trade Commission
GMPCS	Global Mobile Positioning Communications by Satellite
GPRS	General Packet Radio Service
GSM	Global System for Mobile communication
HC	High Court
i.e	That is

ICICI	Industrial Credit and Investment Corporation of India
In Re	In Reference
ISD	International Subscriber Dialing
IT	Information Technology
J	Justice
J&K	Jammu and Kashmir
JT	Judgement Today
KBD	Kings Bench Division
Ker	Kerala
Ltd.	Limited
MMS	Multimedia Messaging Service
M.Phil	Master Of Philosophy
MTNL	Mahanagar Telephone Nigam Limited
NC	National Commission
NGO	Non Governmental Organisation
NTP	National Telecom Policy
OFT	Office Of Fair Trading
Ors	Others
QBD	Queens Bench Division

QCI	Quality Control Of India
SC	Supreme Court
SCC	Supreme Court Cases
SEBI	Security Exchange Board Of India
SCJ	Supreme Court Journal
SCR	Supreme Court Reporter
Sec	Section
SGA	Sale Of Goods Act, 1930
SIM	Subscriber Identity Module
SMS	Short Message Service
STD	Subscriber Trunk Dialing
TDSAT	Telecom Disputes Settlement Tribunal
TOI	Times Of India
TRAI	Telecom Regulatory Authority Of India
UCC	Uniform Commercial Code
UK	The United Kingdom
USA	The United States Of America
V	Versus
VAS	Value Added Services
WLR	Weekly Law Reporter

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INTRODUCTION

INTRODUCTION

In India, the concept of consumer protection is not a new concept. Reference to the protection of consumers' interest against exploitation by trade and industry adulteration were made punishable in Kautilya's 'Arthashastras'. However, an organized movement to safeguard the interest of consumers is a recent phenomenon. The consumers have to be aware not only of the commercial aspects of sale and purchase of goods, but also of health and security aspects. "Consumer Protection Law" or "Consumer Law" is considered to be an area of public law that regulates private law relationships between individual consumers and the businesses that sell those goods and services. Consumer protection covers a wide range of topics, including but not necessarily limited to product liability, privacy rights, unfair business practices, fraud, misrepresentation, and other consumer/business interactions. Consumer protection laws are designed to ensure fair competition and the free flow of truthful information in the marketplace. The laws are designed to prevent those businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and to provide additional protection for the weak and those unable to take care of themselves. Consumer Protection Laws are a form of government regulation which protects the interests of consumers. For example, the government may require businesses to disclose detailed information about products, particularly in the areas where safety or public health is an issue, such as food. Consumer protection is also very closely linked to the idea of "Consumer Rights" (that consumers have various rights as consumers), and to the formation of consumer organizations which help consumers make better choices in the marketplace. Consumer interests can also be protected by promoting competition in the markets which directly and indirectly serve consumers, consistent with economic efficiency. Consumer protection can also be asserted via non-government organizations and individuals as consumer activism. Such laws deal with credit repair, debt repair, product safety, service contracts, bill collector

regulation, pricing, utility turnoffs, consolidation, personal loans that may lead to bankruptcy and much more.

Statutory measures for consumer protection have existed in India for a long time. However, before 1984, there was no effective protection of the consumer interest. The legislative measures dealt with only certain aspects of consumer protection. Moreover, there was no unified and effective machinery for the enforcement of these legislative measures. Consumers did not enjoy statutory rights to seek redress of their grievances arising out of the violation of the provisions of these laws. They lacked awareness about the remedies available under the scattered pieces of existing legislation, intended to curb certain unscrupulous and exploitative business practices rampant in the market. Furthermore, consumers were unorganised and there was no effective consumers' voluntary organisation. The real consumer movement started from 1984. The most significant milestone in the history of consumer protection in India was the passing of the Consumer Protection Act (CPA), in December 1986. The CPA was hailed as the most progressive and comprehensive socio-economic legislation in the country. Its enactment was preceded by a prolonged public debate and a persistent demand from consumer activists and concerned citizens. The CPA sought to provide for better protection of consumer interests through the speedy and inexpensive redress of consumer grievances by a three-tier adjudicative machinery, consisting of consumer tribunals, set up at district and state level as well as at the national level. It sought to provide specific relief and to award suitable compensation, besides other appropriate relief, to the aggrieved consumer. Furthermore, it provided for setting up consumer protection councils, at the national and state levels, for promoting and safeguarding consumers' basic rights.

Objective of the study

The major focus of this dissertation work is consumer protection in India. Its objective is to study the role of Indian judiciary in consumer protection with special reference to the

Telecom industry in India, and how far the law is developed in India in comparison with other countries.

Research Methodology

The methodology used in this study is doctrinal which involved in-depth study of the source materials, text reviews, case studies and extensive analysis of the relevant literature on the concerned issue. Therefore, the study undertaken is both descriptive and analytical. It also traces the legislative developments in national and international level.

Primary as well as secondary sources like legal texts, books, articles, encyclopedias, research papers, newspapers and the Internet material have been referred in order to get the most pertinent information.

Chapterisation

Chapter - I: The first chapter of the study deals with the historical background and the development of consumer protection law in India right from the pre independence era.

Chapter – II: The second chapter of the study deals with the legislative measures relating to consumer protection in India and other countries and the comparative analysis of the consumer protection laws in India and other countries such as USA, UK and Australia.

Chapter – III: The third chapter of the study deals with the important definitions available under the Consumer Protection Act 1986.

Chapter – IV: The fourth chapter of the study deals with the Telecom industry in India and advertisement of the products, services and deficiencies therein. It also deals with the Telecom Regulatory Authority of India (TRAI) and regulation of telecom companies by TRAI.

Chapter – V: The final chapter of the study deals with the role of Indian judiciary in protection of consumers with special reference to the telecom industry in India.

CHAPTER-1

CONSUMER PROTECTION

LAW: HISTORICAL

PERSPECTIVE

Introduction

Consumer Protection has its deep roots in the rich soil of Indian civilization, which dates back to 3200 B.C. from the Vedic age''¹ (ancient period) to the modern period. In the past, human values were cherished and ethical practices were considered of great importance. However, the rulers felt that the welfare of their subjects was the primary area of concern. They showed keen interest in regulating not only the social conditions but also the economic life of the people, establishing many trade restrictions to protect the interests of buyers.

1.1 Consumer Protection in Ancient India

In ancient India, all sections of society followed *Dharma-sastras*² ("Dharma"), which laid out social rules and norms, and served as the guiding principle governing human relations. The principles of *Dharma* were derived from *Vedas*.³ *Vedas* were considered the words of God, and law was said to have divine origin which was transmitted to society through sages.⁴ Thus, *Vedas* were the primary sources of law in India. *Manu Smriti* described the social, political and economic conditions of ancient society. Manu, the ancient law giver, also wrote about ethical trade practices. He prescribed a code of conduct to traders and specified punishments to those who committed certain crimes against buyers. For example, he referred to the problem of adulteration and said "one commodity mixed with another must not be sold (as pure), nor a bad one (as good) not less (than the property quantity or weight) nor anything that is at hand or that is concealed."⁵

The punishment "for adulterating unadulterated commodities and for breaking gems or for improperly boring (them)" was the least harsh. Severe punishment was prescribed for fraud in selling seed corn: "he who sold (for seed-corn that which is) not seed-corn, he who took up seed (already sown) and he who

destroyed a boundary (mark) was punished by mutilation.”⁶ Between 400 and 300 B.C., there was a director of trade whose primary responsibility was to monitor the market situation. Additionally, the director of trade was made responsible for fair trade practices. The director of trade was required to be “conversant with the differences in the prices of commodities of high value and of low value and the popularity or unpopularity of goods of various kinds whether produced on land or in water [and] whether they . . . arrived along land-routes or water-routes, [and] also [should know about] suitable times for resorting to dispersal or concentration, purchase or sale.”⁷ According to Kautilya, “the trade guilds were prohibited from taking recourse to black marketing and unfair trade practice.” During Chandragupta’s period,⁸ in which Kautilya lived, good trade practices were prevalent. Every trader was required to take a license to sell. A trader from outside had to obtain permission. The superintendent of commerce fixed the whole-sale prices of goods as they entered the Customs House. He allowed a margin of profit to fix retail prices. Speculation and cornering to influence prices were prohibited. Thus, the State bore a heavy responsibility for protecting the public against unfair prices and fraudulent transactions. During Chandragupta’s period, easy access to justice for all, including consumers, was also considered of great importance. The king was the central power to render justice. According to Kautilya, “The king should look to the complaints of the people of the town and village in the second part of the day. The mobile and circuit courts worked at night, when necessity arose. They also worked on holidays in urgent matters.”⁹ The king was required to pay full attention to the truth and he was primarily responsible for administering justice. Everyone could approach the king’s court for justice. However, the rule of

standing was strictly followed. The king only entertained cases if the aggrieved presented a valid complaint.

1.2 Consumer Protection in Medieval and Modern Periods

In the medieval period, consumer protection continued to be of prime concern for the rulers. During Muslim rule, a large number of units of weights were used in India.¹⁰ During the Sultanate period, the prices used were determined by local conditions. Consumer protection was of paramount importance in the medieval period in India ranging from 1000 AD to 1750 AD. Several prominent Muslim rulers had ruled India during this period from their capital in Delhi. The Delhi Sultanate, being the start of such a long period of Islamic rule in India, laid the foundation to the economic, financial and commercial backbone of the Indian medieval period. The most notable achievements in Consumer Protection during the Delhi Sultanate were during the period of Alauddin Khilji (1296 AD to 1316 AD). Alauddin Khilji was the second ruler of the Khilji dynasty. During his reign, there were unprecedented improvements in the weights and measures standardization process bringing about dramatic changes in the transparency practices of traders with consumers. Commodities were weighed and measured through standards established by the Sultan and people who did not follow standards were punished through fines and even capital punishment. The Sultan had judges who were omnipotent in enforcing the rights of the consumers and approaching the courts when injustice occurred was simple and without bureaucracy. During the rule of Alauddin Khalji,¹¹ strict controls were established in the market place. In those days, there was unending supply of grain to the city and grain-carriers sold at prices fixed by the Sultan. There was a mechanism for price-

enforcement in the market. Similarly, shop-keepers were punished for under weighing their goods.

Several generations of rulers following the Khilji did not contribute much to the consumer protection cause until Sher Shah Suri who ruled during the brief period between 1540 and 1545 AD. Sher Shah Suri was a visionary in matters related to commerce. He envisioned that an economy is always dependant on how well its consumers are treated. He emphasized on standardized measures and set forth decimal and centenary systems with respect to measures. He also published quality guidelines especially for produce, grocery, confectionaries and pharmaceuticals. The financial system he introduced along with the currency 'Rupiyah' forms the foundation of the monetary system of modern India. Although his reign was brief, he is thought to be one of the most important medieval rulers who has influenced consumer protection policies of modern India.

During the reign of Akbar (1556-1605), the third Mughal Emperor of India, several significant achievements were made in matters related to consumer protection. The right of the consumer to be informed perhaps found its earliest roots during the period. All traders were required to publish details regarding the quality and quantity of their merchandise including weights, measures, adulteration if any, age, grade, and usability. This law was strictly enforced through prefects and secret service personnel employed by the emperor. Violations and deceitful behavior were dealt with the harshest of punishments including amputation of limbs. Consumers also enjoyed the right to return merchandise which did not meet the standard requirements related to quality and quantity. Akbar's contribution is notable in that his rule improved

accountability and transparency in commodity transactions which were perhaps non-existent in the medieval days in India.

Although the Mughal kings that came afterwards did continue the achievements laid by their forefather, they concentrated more on literary, architectural and military pursuits. Eventually by the time the British gained control over the whole Indian peninsula, consumer issues had deteriorated into a stage that needed a rigorous revival. Nevertheless, the awareness, vision and perseverance through which the medieval rulers of India preserved the importance of consumer protection issues has been a source of fascination for international historians and economists

1.3 British Period

In the modern period, the British system replaced the age old traditional legal system of India. However, one of the outstanding achievements of British rule in India was “the formation of a unified nationwide modern legal system”¹² During the British period, ¹³ the Indian legal system was totally revolutionized and the English legal system was introduced to administer justice. However, it is important to note that the traditions and customs of the Indian legal system were not ignored. “The law itself underwent considerable adaptation. The British institutions and rules were combined with structural features [e.g. a system of separate personal laws] and rules [e.g. *Dharma*, and local custom] which accorded with indigenous understanding. The borrowed elements discarded British localisms and anomalies and rules were elaborated to deal with new kinds of persons, property and transactions.”¹⁴ To administer justice, “they were confronted with the problem of the value suitable to attach in practice to the Indian traditions and customs.”¹⁵ Despite the challenges of combining the British and Indian legal systems, “the fabric of modern Indian

Law . . . is unmistakably Indian in its outlook and operation”¹⁶ and consumer protection is not an exception to this perception.

Some of the laws which were passed during the British regime concerning consumer interests are: the Indian Contract Act of 1872, the Sale of Goods Act of 1930, the Indian Penal Code of 1860, the Drugs and Cosmetics Act of 1940, the Usurious Loans Act of 1918, and the Agriculture Procedure (Grading and Marketing Act) of 1937. These laws provided specific legal protection for consumers. For fifty-five years, the Sale of Goods Act of 1930 [SGA] was the exclusive source of consumer protection in India. The SGA, drafted with precision, is “an admirable piece of legislation.”¹⁷ It is also praised as a “Consumer’s Charter.” The main protection for the buyer against the seller for defective goods is found in Section 16 of the Act.”¹⁸ It provides exceptions to the principle of *Caveat emptor* (“let the buyer beware”) and the interests of the buyer are sufficiently safeguarded. Phrases such as “skill and judgment of the seller”, “reliance on sellers’ skill”, and the test of “merchantable quality” provide effective remedies to buyers. Courts interpreted these rules in the consumer’s favour.¹⁹ Consumer protection was also provided within India’s criminal justice system. The Indian Penal Code of 1860 has a number of provisions to deal with crimes against consumers. It deals with offenses related to the use of false weights and measures,²⁰ the sale of adulterated food or drinks, the sale of noxious food or drink, and the sale of adulterated drugs.”²¹

Consumer protection legislation enacted after India’s independence from Britain include: the Essential Commodities Act of 1955, the Prevention of Food Adulteration Act of 1954 and the Standard of Weights and Measures Act of 1976. A benefit of these acts is that they do not require the consumer to prove *mens rea*. Rather, “the offenses are of strict liability, and not dependent on any

particular intention or knowledge.”²² Criminal law in the field of consumer protection has acquired much significance, as consumers are less inclined to go to civil court for small claims. It has been said that “the functional value of criminal law in the field of consumer protection is a high one and it has a respectable pedigree.”²³ Another view is that there has been an attempt to look at consumer protection as “a public interest issue rather than as a private issue” to be left to individuals for settlement in court.

In addition to the remedies under contract and criminal law, consumers have rights under tort law. Based on its numerous legal intricacies, however, tort law is not the ideal remedy for injured consumers in India. For example, the traditional doctrine of negligence imposes heavy responsibility on the plaintiff to prove each of its required elements. These traditional legal requirements naturally encourage injured consumers to pursue legal remedies under different laws.”²⁴ Not surprisingly, it is estimated that for about half a century from 1914 to 1965, only 613 tort cases came before the appellate courts.”²⁵

The orthodox legal requirements under the law of torts and contracts forced the policy makers to draft specific legislation to protect consumers. As a result, the Consumer Protection Act of 1986 was enacted with the objective of providing “cheap, simple and quick” justice to Indian consumers.

1.4 Post Independence

One could be forgiven for thinking that consumerism was largely invented by Mr. Ralph Nader, the well-known American Advocate. History of protection of Consumer’s rights by law has long been recognised dating back to 1824. Every year the 15th of March is observed as the World Consumer Rights Day. On that day in 1962 President John F. Kennedy of U.S. called upon the U.S. Congress to accord its approval to the Consumer Bill of Rights.

- They are (i) right to choice;
(ii) right to information,
(iii) right to safety and
(iv) right to be heard.

President Gerald R. Ford added one more right i.e. right to consumer education. Further other rights such as right to healthy environment and right to basic needs (Food, Clothing and Shelter) were added. In India we have recently started celebrating 24th December every year as the National Consumer Rights Day. In the history of the development of consumer policy, April 9, 1985 is a very significant date for it was on that day that the General Assembly of the United Nations adopted a set of general guidelines²⁶ for consumer protection and the Secretary General of the United Nations was authorised to persuade member countries to adopt these guidelines through policy changes or law. These guidelines constitute a comprehensive policy framework outlining what Governments need to do to promote consumer protection in following seven areas:

- i.* Physical safety;
- ii.* Protection and Promotion of the consumer economic interest;
- iii.* Standards for the safety and quality of consumer goods and services;
- iv.* Distribution facilities for consumer goods and services;
- v.* Measures enabling consumers to obtain redress;
- vi.* Measures relating to specific areas (food, water and pharmaceuticals) and
- vii* Consumer education and information programme.

1.5 The Consumer Protection Act of 1986

The Indian legal system experienced a revolution with the enactment of the Consumer Protection Act of 1986 ["CPA"], which was specifically

designed to protect consumer interests. The CPA was passed with avowed objectives. It is intended to provide justice which is “less formal, and involves less paper work, less delay and less expense”. The CPA has received wide recognition in India as poor man’s legislation, ensuring easy access to justice. However, the CPA simply gives a new dimension to rights that have been recognized and protected since the ancient period. It is rightly said that “the present-day concern for consumer rights . . . is not new and that consumer’s rights like the right to have safe, un-adulterated and defect-free commodities at appropriate prices has been recognized since ancient times.”²⁷

The experience with the operation of the CPA shows its popular acceptance and the legal preference of injured consumers to enforce their rights under it. The CPA commands the consumer’s support because of its cost-effectiveness and user-friendliness. In fact, the CPA creates a sense of legal awareness among the public and at the same time, brings disinterest to approach traditional courts, especially on consumer matters. It has changed the legal mindset of the public and made them think first of their remedies under the CPA, regardless of the nature of their case. In short, the CPA has instilled confidence among the “teeming millions” of impoverished litigants. The way in which the consumer fora are flooded with cases and the mode in which these cases are being disposed off creates an impression of “judicial populism” in India in the arena of consumer justice.

The greatness of the CPA lies in its flexible legal framework, wider jurisdiction and inexpensive justice. One can find in the CPA a mixture of principles of torts and contracts. Simply speaking, it is “a shorthand term to indicate all the many different aspects of general law.”²⁸ Basically, the CPA liberalizes the strict traditional rule of standing and empowers consumers to proceed under the

CPA.²⁹ Consumer groups, the central or any state government are all empowered to lodge complaints under the CPA.³⁰ This liberalization shows the care that has been taken to represent and fight for the cause of weak, indifferent and illiterate consumers. The novelty of the CPA is the inclusion of both goods and services within its ambit. The consumer can bring suit for defective products as well as for deficiency of services.’’³¹ In the event of any deficiency, all services, whether provided by the government or private companies, can be questioned under the CPA.

The CPA also liberalized rigid procedural requirements and introduced simple and easy methods of access to justice. To proceed under the CPA, the consumer need only pay a nominal fee and need not send any notices to the opposite party. A simple letter addressed to the consumer forum draws enough attention to initiate legal action. Another major procedural flexibility is the option the consumer has to engage a lawyer. If the consumer prefers, he can represent himself. The simple measures of action drive consumers to avail themselves of the benefits of the CPA.

The CPA initiated a legal revolution by ushering in the era of consumers and developing a new legal culture among the masses to take recourse under the CPA regardless of their grievance. The Consumer Disputes Redressal agencies, the National Commission, the State Commission, and the District Fora are working together in a way that is revolutionizing the present Indian legal system and challenging the traditional system of delivering justice. With easy access to the courts guaranteed by the CPA, consumers now wage legal battles against unscrupulous traders or service providers without any hesitation. The Indian government is also taking an active interest in protecting consumer rights and promoting effective consumer movements. In 2003, the Planning

Commission of India identified “Consumer Awareness, Redressal, and Enforcement of the Consumer Protection Act of 1986” as a priority, and as a result, a national action plan was prepared.

The consumer fora created by the CPA have proven to be effective, disposing of thousands of cases with few legal formalities, and leading the way towards well-founded consumer jurisprudence in India. The traditional Indian legal system, in addition to a huge backlog of cases, is experiencing a litigation explosion in the area of consumer protection. According to one report, the total number of consumer cases pending in different fora was 359,469 cases as of June, 2004.’’³² Around 45,798 cases have been filed before the national commission since its inception. At present, 8,884 cases are pending disposal.’’³³ The huge backlog of consumer cases before consumer fora is forcing the Indian legal systems to think of “alternatives” for speedy disposal of consumer cases. India, home to the majority of the world’s consumers, is committed to working for the welfare of consumers through new legal innovations.

During the course of time new challenges and circumstances rise as a challenge before every law. But the law has to stand the tests of the time and therefore, amendment of law is undertaken. Similarly the CPA 1986 also underwent the amendments in order to provide the better solutions to the legal problems. Although, by amending laws a solution to the problem is provided but there is always a scope of improvement e.g. CPA 1986 as amended by the amendment act 2002 has brought some laurels yet there are some loopholes as well.

1.6 Highlights of the Consumer Protection (Amendment) Act, 2002

Legal terminology apart, every human being at some point or other, has donned the role of a consumer in his/her lifespan. When we buy an electric appliance for the home, get the monthly ration or buy a brand new car- we become

consumers. When we pay some fees to a doctor for the medical services provided by him/her, when we pay the telephone bill or when we post a registered letter- we become consumers of the doctor, telephone department and the postal services respectively.

Thus it would not be an exaggeration to point out that the CPA, 1986, is one of the most important legislations that governs the life of every human being in his transactions with the society for availing goods and services provided by others. It not only comes into daily use but prevents the exploitation of common man, the consumer, at the hands of the affluent and moneyed business man or service provider. Hence any change or amendment whatsoever, in the Act directly affects the common people thereby needing a close scrutiny of the amendments thereto. Some of the most profound amendments to the Consumer Protection Act, 1986 brought about by the Consumer Protection (Amendment) Act, 2002, the subsequent repercussions of those respective amendments, the shortcomings which have still not been rectified despite the amendment and also the benefits that are resultant of certain amendments need to be analysed. Some major loopholes of the Act still left unplugged by the 2002 Amendments are discussed here:

1) One of the biggest achievements of the Consumer Protection (Amendment) Act, 2002, was the conferment of First Class Magistrate's powers to the Consumer Forums or Commissions.

The main problem regarding the above empowerment and the relevant provision is the fact that the Gazette notification for the conferment of First Class Magistrate's powers to the Consumer Forums or Commissions is still not issued. Thus it is practically impossible for the Forums or Commissions to exercise this power conferred by the Act.

2) Another lacuna present in the amended Act is the relatively softer approach adopted by the Act towards the judgment debtor in its certain provisions. The amendment of 2002 has not done anything concrete to fill this lacuna. For instance, S. 24 of the Consumer Protection Act, 1986, which reads as follows:-

S.24: Finality of order:-

Every order of a District Forum, State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final.

Thus this provision implies that non- preferment of appeal renders the order final. Conversely, preferring an appeal means that order is not final. Hence once an appeal is preferred by the judgment debtor, he gets a stay against the execution and thus there cannot be any execution. The judgment debtors have certainly misused this provision of the Act. It is a general pattern that judgment debtors just buy time before the Forum or Commission stating that appeal has been preferred. Even if the appeal is not admitted and may take quite some time for the purpose, even if the required bank guarantee is yet not given and the stay is still not granted, the consumer cannot get the execution of the original order done. Thus justice still eludes the helpless consumer while the seller (judgment debtor) more often than not manages to get adjournment. The Act is silent regarding a 'stay order'. Even the Amendment Act of 2002 disappoints in this regard. This Section urgently calls for amendment substituting the words "appeal preferred" with the words 'stay granted'.

3) Another important confusion is created by the amended S.25 of the Act that reads as under:

S.25: Enforcement of orders by the Forum, the State Commission or the National Commission:-

(1) Where an interim order made under this Act, is not complied with the District Forum or the State Commission or the National Commission, as the case may be, may order the property of the person, not complying with such order to be attached.

(2) No attachment made under sub-section (1) shall remain in force for more than three months at the end of which, if the non-compliance continues, the property attached may be sold and out of the proceeds thereof, the District Forum, or the State Commission or the National Commission may award such damages as it thinks fit to the complainant and shall pay the balance, if any, to the party entitled thereto.

(3) Where any amount is due from any person under an order made by a District Forum, State Commission or the National Commission, as the case may be, the person entitled to the amount may make an application to the District Forum, the State Commission or the National Commission, as the case may be, and such District Forum or the State Commission or the National Commission may issue a certificate for the said amount to the Collector of the district (by whatever name called) and the Collector shall proceed to recover the amount in the same manner as arrears of land revenue.

If we carefully give a perusal to the above provisions of the above section, we find that by virtue of S.25 (1) the provision of attachment is against the interim order and not the final order. But looking at the pattern of judgments, it can be clearly discerned that generally attachments are aimed at awarding compensation to the aggrieved party, mostly the consumers. Compensations are usually awarded as part of the final order and the interim order almost never awards compensation. Interim orders aim at compelling or restraining any agency for the commission or omission of some act but these interim orders are

seldom used by the Forums or Commissions to attach or seal the property of any business person, manufacturer, banks, medical establishments, etc. for the simple reason that the Forums/ Commissions are not aware if there will be any compensation order against them at the conclusion of the proceedings before Consumer Protection Agencies. Since no recovery proceeding is provided under the Act, there cannot be any assessment of the dues and thus no interim attachment order. Thus a more practically feasible approach would be to replace the word interim order with all orders.

4) Also S. 25 (3) provides for issuance of a certificate to the Collector for recovery of the amount due from any concerned person. The consumers have to contact the Collector for recovery of their dues because there is no further provision as to what is the role of Consumer Forums/ Commissions after that. After a long wait for the order from the Forum, the helpless consumers still have to undergo the rigor of going to the collector for the realization of the dues. There is no clarity regarding who is responsible for the follow up with the revenue department and the stipulated time limit thereto. Thus the concerned provision of S. 25 (3) should provide for the revenue department to send the arrears to the Forum itself for reimbursement to the consumer.

Thus an amendment is required to take care of the afore-mentioned problem.

However while criticising certain provisions of the Act, at the same time it is necessary to point out certain other provisions which are the product of the 2002 Amendments and have plugged many loopholes by their progressive wording. These provisions brought about by the amendment have gone a long way in doing away the perennial problems of delay.

1) Amendment to Section 11 enhances the jurisdiction of the District Forum to entertain complaints where the value of the goods or services and the

compensation claimed do not exceed rupees twenty lakhs. This will be more convenient for the complainants and also reduce the number of complaints filed with the State Commission and National Commission.

2) Section 12 is substituted to provide that every complaint filed with the District Forum shall be accompanied with such amount of fee as may be prescribed. It also provides that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint is received and that once admitted a complaint shall not be transferred to any other Court or Tribunal. This will help to quicken disposal of complaints.

3) The amendments to section 13 require the District Forum to refer a copy of the admitted complaint within twenty-one days from the date of its admission to the opposite party to give his version within the prescribed time. It also provides the much needed provision for ex parte order as well as dismissal of complaint on non-appearance of complainant.

It includes a new sub-section (3A) to provide that complaint shall be heard as expeditiously as possible and endeavour made to decide the complaints within the prescribed period. Adjournments would ordinarily not be granted, and if granted for reasons to be recorded in writing by the forum, an order as to the costs occasioned by the adjournment would also be made by the forum. It is also provided that in the event of a complaint being disposed of after the period so specified, the District Forum shall record in writing, the reasons for the same at the time of disposing of the said complaint.

It further includes a new sub-section (3B) to enable the District Forum to pass interim orders where required. It also includes a new sub-section (7) for the substitution of parties in accordance with the provisions of Order XXII of the

First Schedule to the Code of Civil Procedure, 1908 in the event of death of the complainant or opposite party.

These amendments will facilitate quicker disposal of cases and enable complainants to get immediate relief. The procedural delays will be done away with.

4) New section 19A provides that endeavour shall be made to dispose of appeals filed before the State Commission or the National Commission within ninety days from the date of admission.

These are just some of the useful amendments and the afore-mentioned list is definitely not exhaustive. In fact, all the amendments made to the Consumer Protection Act by the 2002 Amendments aim at furthering the efficiency of the Act and doing away with procedural delays which render the consumers disillusioned and dissatisfied. These Amendments have been fruitful in providing 'protection' to the consumers in the real sense of the term and served the purpose of the Act. It is hoped that further amendments would aim at even more efficiency and render the position of the consumers much stronger in this era of globalization and privatization where the sudden unchecked advent of Multi National Companies has to be balanced with the protection of the rights of the consumers by the legislature and the judiciary.

Conclusion

Consumer Protection is not a new concept to the rich soil of Indian civilization, which dates back to 3200 B.C. In ancient India, human values were cherished and ethical practices were considered of great importance. However, the rulers felt that the welfare of their subjects was the primary area of concern. They showed keen interest in regulating not only the social conditions but also the economic life of the people, establishing many trade restrictions to protect the

interests of buyers. The rulers and the kings in the ancient and medieval India were duty conscious of the welfare of the people. The consumer issues were not complex. With the passage of time the situation changed and trade within and outside grew manifold during medieval period in India and the rulers were well aware of the consumer interests and there were laws to protect the consumers and punish the defaulters. During British rule there were many provisions regarding consumer protection available under some Acts like the Indian penal code, 1860 the Sale of Goods Act, 1930 and the Drugs and Cosmetics Act, 1940 but these provisions were not sufficient to provide the protection to the consumers. The Indian legal system experienced a revolution with the enactment of the Consumer Protection Act of 1986, which was specifically designed to protect consumer interests. The CPA was passed with avowed objectives. It is intended to provide justice which is “less formal, and involves less paper work, less delay and less expense”. The CPA has received wide recognition in India as poor man’s legislation, ensuring easy access to justice.

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1. 5000B.C. to 2500 B.C. Different versions give different dates for the actual period of the *Vedic* age. However, it is said that “The Vedic age in India which is considered to be the first literary source of civilization, is seen as a glorious period of cultural evolution in the ancient world . . . The Vedas are not books of law but are the repository of culture delineating the feelings and habits of the people of the time which indicate and give vivid ideas of legal concepts in a developed civilization.” Gurjeet Singh “*The problem of Consumer Protection in India: A Historical Perspective*” Consumer Protection Reporter 704 at 705, n.6 (1994 III)
2. Codes of morals. They also deal with the rules of conduct, law and customs.
3. Shraddhakar Supakar, Law of Procedure and Justice in India, 38 (1986). *Veda* means knowledge. There are four *Vedas*: the *Rigveda*, the *Yajurveda*, the *Samaveda* and the *Atharvaveda*.
4. *Id.* at 39.
5. Manu, The Laws of Manu, 290 (George Buhler trans., 1990).
6. *Id.* at 394.
7. R.P. Kangle, The Kautiliya Arthasastra – Part III – A Study 116 (2000) [hereinafter Kangle Part III].
8. Chandragupta Maurya ranks as one of the India’s greatest rulers. The period dates back to 323 B.C.
9. Supakar, *supra* note, 3 at 114-15.
10. Maulana Hakim Syed Abdul Hai, *India- During Muslim rule* 127 (Mohinuddin Ahmad tans. 1977).
11. 1296 – 1316.

12. Marc.Galanter, *Law and Society in Modern India* 15 (1997).
13. From 1600 to 1947. The Regulating Act of 1773 was passed by the British Parliament and one of its objectives was to bring the management of the East India Company under the control of the British Parliament and British Crown.
14. Galanter, *supra* note 41, at 48
15. Robert Lingat, *The Classical Law of India* 137 (1998).
16. Galanter, *supra* note 41, at 49.
17. Gordon Borrie & Aubrey L. Diamond, *The Consumer, Society and the Law* 65 (1964).
18. S.16 of Sale of Goods Act says “ Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
 - (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which goods are required, so as to show that the buyer relies on the seller’s skill or judgment and the goods are of a description which it is in the course of the seller’s business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:
Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose
 - (2) Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith. Sale of Goods Act, No. 3 of 1930; India Code (1930), ch. 2 § 16.

19. Borrie and Diamond, *supra* note , at 66.

20. . Indian Penal Code, No. 45 of 1860, ch. 13 §§ 264-67.

21. 2627. *Id.* at ch. 14 §§ 272-76.

22. D.N. Saraf, *Law of Consumer Protection in India* 169 (1990).

23. Gordon Borrie, *The Development of Consumer Law and Policy: Bold Spirits and Timorous Souls* 3 (1984).

24. *See Wormell v. R.H.M. Agriculture (East), Ltd.* [1987] 1 W.L.R. 1901.

25. It is said, due to the congestion of courts with heavy arrears, it may take 5 to 15 years for a claimant to wade through the different levels of courts in tort litigation in India.

26. General Assembly Resolution 39/ 85

27. Singh, *supra* note 1, at 719.

28.. Bill Thomas, *The Legal Framework of Consumer Protection, in Marketing and the Consumer Movement* 49 (Jeremy Mitchell ed., 1978).

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30. *Id.* at ch. 2 § 1(b)(iii).

31. *Id.* at ch. 2 § 1(c).

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CHAPTER-2

LEGISLATIVE MEASURES IN OTHER COUNTRIES

Introduction

Consumer protection is a concept of worldwide popularity now a days. This concept gained the momentum when on April 9, 1985 the General Assembly of the United Nations adopted a set of general guidelines for consumer protection and the Secretary General of the United Nations was authorised to persuade member countries to adopt these guidelines through policy changes or law. The member countries including India were obliged to draft new pieces of legislation relating to the consumer protection. The laws relating to the consumer protection in these countries were not adequate to protect even the basic rights of consumers. But the situation has changed altogether after these countries passed the special Acts relating to the consumer protection.

2.1 Legislative Measures in USA

The history of consumer protection in the United States is the story of specific formal legal responses to crises and emergencies that generate great public outrage and require a public response. This pattern began against the background of the 19th century common law, which emphasized freedom of contract and caveat emptor (let the buyer beware). Over time, specific crises and political events led to both the creation of government bureaucracies with jurisdiction over specific products and practices affecting consumers and a broad array of private rights of actions where consumers can sue for damages, injunctions, attorney fees, and litigation costs if they can show harm from the illegal practice. One of the earliest examples was the deplorable conditions in the American meat packing industry which were exposed by Upton Sinclair in his best selling 1905 novel *The Jungle*. However, the modern consumer protection movement began in the 1960s with reference to a Consumer Bill of Rights by President Kennedy.

2.2 Federal Mechanism For Consumer Protection

The principal, but not the only, consumer protection agency at the federal level is the United States Federal Trade Commission ("FTC").¹ This section of the

chapter outlines the powers and remedies of FTC in the consumer protection area and then briefly describes some of the other federal agencies with significant consumer protection responsibilities.

(a) Federal Trade Commission

The United States Federal Trade Commission (FTC) works independently, and also in concert with other federal agencies to administer a wide variety of consumer protection laws. The overall goal is to afford consumers a deception-free marketplace and provide the highest quality products at competitive prices. The FTC is an independent federal agency with five Presidentially-appointed, Senate-confirmed commissioners each serving seven-year terms.² No more than three commissioners may be members of the President's political party. Created in 1914, the FTC has two principal goals:

1. to protect consumers by preventing fraud, deception, and unfair business practices in the marketplace, and
 2. to maintain competition by preventing anticompetitive business practices.
- The FTC's Bureau of Consumer Protection aims to achieve the first goal.³

(b) Other Federal Agencies

Other federal agencies also play an important role in protecting consumers. The U.S. Consumer Product Safety Commission (CPSC) is a federal regulatory agency with the mandate of reducing injury or death caused by consumer products.⁴ The CPSC develops product standards for manufacturers while also conducting recalls of any products that could, or do, cause harm.

(i) The Bureau of Consumer Financial Protection

The most significant change in federal consumer protection came this past year as a result of the worldwide financial crisis. The Dodd- Frank Wall Street Reform and Consumer Protection Act of 2009 ("Dodd-Frank Act")⁵ contains a provision, entitled the "Consumer Financial Protection Act of 2010" which established an independent entity within the Federal Reserve System, the Bureau of Consumer

Financial Protection “the Bureau”.⁶ The new bureau eventually will have a budget of up to \$500 million and will consolidate various consumer protection functions now being performed by the FTC and other federal agencies such as the Federal Reserve, the Federal Deposit Insurance Corporation, and the Department of Housing and Urban Development.⁷

(ii) Powers of the Bureau

The Bureau is charged with:

Conducting financial education programs; collecting, investigating, and responding to consumer complaints; collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets; supervising covered persons for compliance with Federal consumer financial law; and issuing rules, orders, and guidance implementing Federal consumer financial law.⁸

2.3 State Mechanism for Consumer Protection

Much like the federal government, state governments act as both consumer law enforcement agencies and consumer advocates, again highly decentralized and without the presence of any single overarching consumer protection department or agency.⁹

2.4 State Level Investigation and Enforcement

In most of the fifty states, the State Attorney Generals are charged with enforcing state consumer protection laws.¹⁰ As consumer advocates for their state populations, Attorney Generals may file lawsuits on behalf of consumers, investigate possible violations, issue injunctions to terminate ongoing illegal activity, obtain restitution on behalf of consumers, bring criminal cases when authorized by law, and make rules to govern trade practices. The National Association of Attorneys General (NAAG) facilitates cooperation among Attorney Generals to enhance their consumer protection effectiveness and support multi-state consumer protection activity and litigation.¹¹ In larger cities

and counties, there may also be a consumer protection division or bureau handling criminal and civil investigations and cases under state or local law.¹²

2.5 Legislative Measures In United Kingdom

Consumer protection in the United Kingdom is effected through a multiplicity of Acts of Parliament, statutory instruments, government agencies and departments and citizens' lobby groups and aims to ensure that the market economy produces fairness and quality in goods and services . The main areas of regulating consumer affairs include,

- fairer terms in contracts for goods and services, by declaring surprising and onerous terms as unfair,
- product safety regulation, to ensure that people do not purchase goods that are potentially harmful,
- financial regulation, to ensure that access to credit is cheaper and people fully understand the obligations they have when taking loans, and
- stronger competition in the private sector, through breaking up cartels, dismantling monopolies and unwinding some mergers.

Because the United Kingdom, through its membership of the European Union is part of the internal market, it works with other European countries and EU institutions to produce and enforce consumer protection laws transnationally. Consumer protection laws in the United Kingdom include Consumer Credit Act 1974, Unfair Contract Terms Act 1977, Unfair Terms in Consumer Contract Regulations 1999, and Unfair Contract Terms Bill. The United Kingdom, as member state of the European Union, is bound by the consumer protection directives of the EU. Domestic (UK) laws originated within the ambit of contract and tort but, with the influence of EU law, it is emerging as an independent area of law. In many circumstances, where domestic law is in question, the matter is judicially treated as tort, contract, restitution or even criminal law. Consumer Protection issues are dealt with when complaints are made to the Director-General of Fair Trade. The Office of Fair Trading (OFT)¹³

will then investigate, impose an injunction or take the matter to litigation. However, consumers cannot directly complain to the OFT. Complaints need to be made to Consumer Director who will provide legal advice to complainants, or re-direct the individual complaint to Trading Standards for investigation. Due to restrictions within the Enterprise Act 2002, individual complainants are unable to be told whether their case is being investigated or not. In very rare cases, Consumer Director may direct a very large number of complaints to the OFT to be considered as a systemic complaint. The OFT can also be engaged by consumer groups e.g. The Consumers Association or the statutory consumer protection body - Consumer Focus - via a super complaint. The OFT rarely prosecute companies, however, preferring a light touch regulation approach. Consumer complaints against companies are not published, but investigation work, undertakings and enforcements are located at.¹⁴ Many of the consumer protection laws e.g. Distance Selling Regulations 2000 or Unfair Terms in Consumer Contracts Regulations 1999 are actually UK implementations of EU directives. The OFT is one of the bodies responsible for enforcing these rules. This leads to a problem because legislations are clearly designed to deal with individual complaints but the OFT will only deal with systemic complaints and will ignore individual complainants redirecting them back to Consumer Director. The Office of Fair Trading¹⁵ also acts as the UK's official consumer and competition watchdog, with a remit to make markets work well for consumers, and at a local, municipal level by Trading Standards departments. General consumer advice can be obtained from Consumer Director or via a local branch of the Citizen's Advice Bureau.

2.6 Legislative Measures In Australia

Australia's general consumer laws consist of 13 Acts which cover the same broad subject matter, including two national laws in the form of the consumer provisions of the Trade Practices Act 1974 and the Australian Securities Investment and Commission Act 2001(ASIC Act 2001)and eight state and territory Fair Trading Acts,¹⁶ plus – in three jurisdictions – another three more

laws which deal with generic consumer protections.¹⁷ There are also some general consumer provisions in another eight state and territory laws about the sale of goods.¹⁸

(a) The Australian Consumer Law (ACL)

On 1 January 2011 the Australian Consumer Law (ACL) commenced.

It includes:

- a new, national unfair contract terms law covering standard form contracts;
- a new, national law guaranteeing consumer rights when buying goods and services, which replaces existing laws on conditions and warranties;
- a new, national product safety law and enforcement system;
- a new, national law for unsolicited consumer agreements, which replaces existing State and Territory laws on door-to-door sales and other direct marketing;
- simple national rules for lay-by agreements; and new penalties, enforcement powers and consumer redress options, which currently apply nationally.

The ACL applies nationally and in all States and Territories, and to all Australian businesses. For transactions that occurred up to 31 December 2010, the previous national, State and Territory consumer laws will continue to apply. The ACL is a cooperative reform of the Australian Government and the States and Territories, through the Ministerial Council on Consumer Affairs (MCCA). An Intergovernmental Agreement (IGA) signed by the Council of Australian Governments underpins the establishment of the ACL.¹⁹

2.7 Comparative Analysis of Consumer Protection in India, USA, U.K. and Australia.

(a) USA

The US had a free economy from the start .The public law of consumer protection in the United States is a mess. As a result, the effectiveness of litigation and other methods to enforce those laws is in jeopardy. This has occurred because those

who decide the country's public policy on consumer protection are torn between two opposing perspectives. On the one hand, policymakers strive to preserve freedom of contract and a marketplace unburdened by the costs that result from government agencies and individuals enforcing strong consumer laws. Under this

free market model, favored by the business community, consumers are responsible for their actions, and "free" to enter into bad deals, including contracts that take away their right to resolve disputes in court.²⁰ There is great variation among consumer protection laws, however, with it in its own somewhat unique way. The law varies depending on whether a transaction involves credit cards or debit cards, home mortgage loans or loans not secured by a personal residence, heavily regulated financial institutions such as banks or loosely regulated institutions such as companies that cash checks. There is no uniformity and no consistency among the various consumer protection laws and how they are enforced because there is no national consensus on what laws are necessary to protect consumers and who should enforce those laws. The development of public consumer law in the United States differs significantly from the approach of the European Union where there is a modicum of consensus and uniformity.²¹

(i) Federal Laws and Regulations: The Lack of Uniformity and Spotty Coverage

Federal consumer protection law is not uniform and its coverage is not comprehensive. These characteristics have a substantial effect on litigation and the enforcement of these laws. Over the course of several years, Congress seemed to be headed in the direction of establishing a national uniform law to protect consumers. The Consumer Credit Protection Act regulates the disclosure of credit terms and discrimination in the granting of credit. Despite the title of the Act, it also covers many areas besides credit transactions, for it governs consumer leases, consumer reporting agencies gathering information for non-credit transactions such as employment and insurance, debt collection,

and electronic fund transfers.²² It would be wrong, however, to conclude that the United States has a comprehensive and adequate uniform national statutory framework for consumer protection and its enforcement. Some of the most important elements of consumer transactions are completely unregulated. For example, the Depository Institutions Deregulation and Monetary Control Act of 1980 deregulated interest rates for an entire segment of the consumer credit market. Other types of fees and charges are also unregulated. Privacy protection has become increasingly important with the development of electronic databases and the epidemic of identity theft. Rather than enacting laws instituting broad privacy protection, however, federal law has inserted narrowly focused protections into a few consumer laws. A significant aspect of every consumer transaction involves the consumer paying for goods or services. Payments law is chaotic, with great variations. Whether or not federal law governs the payment aspect of a consumer transaction depends on what type of payment device the consumer uses and what system processes the payment. For example, one kind of stored value card is subject to federal regulation, but all others are not, and few states regulate them. Some aspects of check transactions are subject to federal law. But many other features are subject to the Uniform Commercial Code (UCC), a state law that specifically eschews protecting consumers.²³ As discussed above, consumer law increasingly has become federal law. Having national public laws governing consumer transactions is sound because many consumer problems are national in scope and transactions increasingly cross state lines. States, however, have always played a critical role in protecting consumers. State laws can fill gaps left in the federal law, serve as laboratories that experiment with new approaches to deal with consumer problems, and respond to problems that have a particularly harsh impact on consumers in their state. The second major challenge to consumer protection is the privatization of consumer law, primarily through the pervasive use of mandatory pre-dispute arbitration clauses. Arbitration privatizes the public law in four respects. One, it relegates

dispute resolution to private companies that are not subject to government oversight. Two, arbitration agreements generally prohibit class actions. As a result, no matter how clearly illegal and injurious the company's behavior, enforcement of the law to protect the public is because consumers can gain redress only in one case at a time. Three, arbitrators are not required to follow the law. Therefore, arbitrators can ignore these laws and entirely undermine the goal of the public nature of these laws. Four, arbitration operates in secret, hiding illegal practices from the scrutiny of government agencies. Consequently, those committing such practices are able to escape enforcement by the agencies. This privatization of the law and dispute resolution has substantially diluted the "public" law nature of consumer protection law.²⁴

(b) India

Unlike USA, India is a union of states and there is more powerful center than the states. The central Acts are applied to the whole of the Indian territory except a few states like J&K,²⁵ but the states legislate their own acts on the same model and the object of the central Act with a slight difference in the provisions keeping in view the circumstances of the concerned state. Prior to the enactment of the Consumer Protection Act 1986 there were many Acts under which a consumer could seek the protection against unfair trade practices, but the scope of the provisions in these Acts was limited. There is a comprehensive protection of the consumers under the C.P. Act. There is a three-tier court system under the C.P. Act and no court fee is required to be paid to these forums and there is no need to engage a lawyer to present the case.²⁶ The rights under the Consumer Protection Act, 1986 flow from the rights enshrined in Articles 14 to 19 of the Constitution of India. The Right to Information Act (RTI), which has opened up governance processes of our country to the common public, also has far-reaching implications for consumer protection. The success of consumer movement mainly depends upon the level of consumer awareness generated in the country by educating the consumers about their rights and responsibilities coupled with effective functioning of the

consumer forums throughout the country where the consumers can ultimately assert their rights in seeking redressal. Where the literacy rate is high and social awareness is greater, the consumers cannot be easily exploited. Within India, the level of consumer awareness varies from State to State depending upon the level of literacy and the social awareness of the people.

There is a growing awareness in India and the common masses are taking interest in the market and its ever changing trends to become aware of the quality of the products and regulation of the markets and application of laws to protect their rights and hard earned money as well. As regards the efforts being made by the Government of India, the Department of Consumer Affairs, being the nodal Department in the field of consumer protection, has been given the mandate to strengthen the consumer movement in the country by generating awareness amongst the consumers on the one hand and simultaneously providing for a grievance redressal machinery, by means of the Consumer Protection Act, 1986. The need for empowerment of consumers as a class cannot be over emphasized and is already well recognized all over the world. The Department of Consumer Affairs has been continuing a countrywide multi-media awareness campaign since 2005, whereby various issues related to consumer rights and responsibilities are highlighted. "Jago Grahak Jago" has today become a household name. As a natural corollary, joint publicity campaigns are being carried on with all Government Departments/ Organizations having mass consumer base by means of TV, radio, newspapers, railways, outdoor advertising etc.²⁷

(c) United Kingdom

Unlike UK, India is not a part of any transnational directive and, it is rather an advantage being independent of any such directive because of the various factors like a vast geographical extent than that of any European countries and the diverse cultural patterns. Unlike UK, there is a comprehensive Act dealing with almost all the matters pertaining to the consumer protection hence it becomes easy for both the manufacturer/seller and the consumer to know the

law. Consumer Protection issues are dealt with when complaints are made to the Director-General of Fair Trade. The Office of Fair Trading(OFT)²⁸ will then investigate, impose an injunction or take the matter to litigation. However, consumers cannot directly complain to the OFT. Complaints need to be made to Consumer Director who will provide legal advice to complainants, or re-direct the individual complaint to Trading Standards for investigation. Due to restrictions within the Enterprise Act 2002, individual complainants are unable to be told whether their case is being investigated or not. In very rare cases, Consumer Director may direct a very large number of complaints to the OFT to be considered as a systemic complaint. However, the remedy available under special Acts in the countries like UK has their advantages as well, since the people are aware about the laws and particularly in their own language, it provides a better and a speedy remedy as courts find it easier to uphold the rights of the consumers under these special Acts.

In India, although implementation of the Consumer Protection Act can be viewed as a success, there are still serious shortfalls in achieving consumer welfare because of the deficiencies in quality infrastructure in the country. First, there is a regulatory deficit in many products and services which impact on the health, safety and environment of the consumers and mandatory standards have not been prescribed for such products as electrical and electronic goods, IT and telecom equipment, industrial and fire safety equipment and toys. There is a multiplicity of regulatory/standardization/conformity assessment bodies and proliferation of certification and inspection bodies. At present, the Quality Council of India (QCI) is the main accreditation body for conformity assessment bodies taking up product or system certification or for inspection bodies, and the National Accreditation Board for Laboratories performs the same function for laboratories. However, there is no compulsion on the conformity assessment bodies, inspection bodies or laboratories to obtain accreditation, thus creating a lack of certainty about the existence of quality products, systems, inspections

and laboratories. Laboratory infrastructure is weak in terms of international norms. Quality professionals lack the skills to guide quality improvement efforts in industry. There is apathy among businesses towards standardization in general, and lack of awareness among them about the impact of standards on quality, competitiveness, and profitability.²⁹

(d) Australia

Australia should strive to ensure that its consumer protection legislation remains at world's best standards. This is important for both economic and social policy considerations.³⁰ In Australia, it is now widely recognised that not only do fair, effective and competitive markets generally deliver the best price, quality and access to goods and services to most consumers, but that consumers are not simply passive beneficiaries of competition. Rather, they play a critical role in its success. Consumer protection laws have the potential to help ensure this.³¹

ACL has been a breakthrough for consumers. But all is not well with the law introduced on 1 January 2011. One of its biggest problems is that only few Australians know anything about it. Consumer rights across Australia ACL combined 20 different state and federal laws into a single piece of legislation to offer uniform consumer rights across the country. Using its new powers under the ACL, the Australian Competition and Consumer Commission (ACCC) has already investigated unfair contracts of airlines, telecommunications and car-hire companies (see *Cracking down on car-hire companies*) – industries with the highest level of consumer complaints. And, for the first time, the ACCC and state and territory fair trading offices can issue infringement notices.

There have already been some wins. In July 2011, the Federal Court fined Optus \$5.3 million for misleading advertising of its broadband plans. The ruling judge said this will act as a deterrent to Optus and other traders who see misleading advertising as a profitable strategy. Seeking clarity discovering that the new laws exist is one thing; understanding them is another. Though clarity was a goal, the fact that the laws define “consumer” in four different ways

gives some idea of their complexity. Consumer law experts agree that they turned out less than user-friendly.

Professor Stephen Corones from the Queensland University of Technology, who was involved in deciding how product warranties should be worded in the new laws, told CHOICE³² there were a number of different views about what the consumer definition should be during consultation but in the end it was agreed that “we should adopt one definition uniformly”. He believes the decision to steer away from the single definition was unfortunate because it detracts from the clarity of the law and cost effectiveness of compliance. Professor Gail Pearson from the University of Sydney told us “the legislation does not fully realise the expectations of the community of simple, easily accessible rules”.

The Legislative and Governance Forum on Consumer Affairs Chair, John Rau, told us that the ongoing education of both consumers and traders will be crucial to making the laws work. A key goal for consumers, he said, is “to be aware where they can get help when things go wrong”. Consumers can access fact sheets about the law and how it affects them on a daily basis at www.consumerlaw.gov.au. Despite the shortcomings, the government appears to be behind the spirit of the new laws from both a consumer and business standpoint. Parliamentary Secretary to the Treasurer, David Bradbury, told CHOICE that “markets work more effectively when consumers are confident that they can transact with business knowing that there are clear rights and responsibilities, and when businesses are free to compete and innovate to serve consumer needs”.

The goal of the new consumer protections is laudable and long-awaited, but the effect of the new laws on transactions in the consumer marketplace will only be known as each new provision is put to the test.³³ Though, there are ample laws in Australia for the consumer protection, yet the problem of enforcing those rights is still there like India. Unlike India, Australia does not have a large population and the literacy rate is better than that of India. India is not lagging

behind in terms of laws as compared to Australia, but it cannot be denied that there is a lot to do in terms of consumer awareness and the better enforcement mechanism as well. No doubt, many NGO's are working in India towards this direction, but most of them confine their activities to the urban areas, and there are only a few NGO's or activists working in rural areas of India thus a huge chunk of population remains unaware and with the result they do not enforce their rights. There is a need to hold more and more awareness camps in rural areas, which can be done through village panchayats. It should be made an integral part of the activities of village panchayats and help may be taken from NGO's or activists in this regard. There should be an active participation of traders/sellers as well and it should be a give and take process.

Conclusion

On perusing the legislative measures in other countries, it may be concluded that there is no lacking of legislation in India regarding consumer protection, but there are many hurdles which are to be crossed to achieve the object of these legislative measures. Consumer awareness has to be given the priority, since it is the lack of awareness of the rights in consumers which hinders the progress of achieving the object of the consumer protection legislation. The procedure of dealing with the consumer complaints should be made simple and time saving. Many NGO's are working in the field of consumer awareness, but these NGO's need to reach the grass root level, so that the enactment of the Consumer Protection Act becomes meaningful. The success of consumer movement mainly depends upon the level of consumer awareness generated in the country by educating the consumers about their rights and responsibilities coupled with effective functioning of the consumer forums throughout the country where the consumers can ultimately assert their rights in seeking redressal. Where the literacy rate is high and social awareness is greater, the consumers cannot be easily exploited. Within India, the level of consumer awareness varies from State to State depending upon the level of literacy and the social awareness of the people.

There is a growing awareness in India and the common masses are taking interest in the market and its ever changing trends to become aware of the quality of the products and regulation of the markets and application of laws to protect their rights and hard earned money as well. As regards the efforts being made by the Government of India, the Department of Consumer Affairs, being the nodal Department in the field of consumer protection, has been given the mandate to strengthen the consumer movement in the country by generating awareness amongst the consumers on the one hand and simultaneously providing for a grievance redressal machinery, by means of the Consumer Protection Act, 1986 . The need for empowerment of consumers as a class cannot be over emphasized and is already well recognized all over the world. The efforts made in other countries to protect the rights of consumers may be borrowed in Indian contexts keeping in view the peculiar circumstances of our country.

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CHAPTER-3

DEFINITIONS UNDER CONSUMER PROTECTION ACT: AN ANALYSIS

Introduction

Consumer protection covers a wide range of topics, including but not necessarily limited to product liability, privacy rights, unfair business practices, fraud, misrepresentation, and other consumer/business interactions. Consumer protection laws are designed to ensure fair competition and the free flow of truthful information in the marketplace. The laws are designed to prevent those businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and provide additional protection for the weak and those unable to take care of themselves. It provides a wide range of definitions which ensure that almost all complaints relating to the consumer grievances fall under the purview of the Act. The definitional part is an important part of the Act, since it clearly demarcates the list of the matters falling under the purview of the Act. The unambiguous meaning assigned to different expressions make it convenient for the Judiciary to uphold the rights of the consumers and redress their grievances.

3.1 Consumer Defined:

Section 2(d) of the Consumer Protection Act says that consumer means any person who—

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised,

or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

Explanation.—For the purposes of the sub-clause (i), “commercial purpose” does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

The provision reveals that a person claiming himself as a consumer of goods should satisfy that the goods are brought for consideration. There must be a sale transaction between a seller and a buyer; the sale must be of goods; the buying of goods must be for consideration. The terms sale, goods, and consideration have not been defined in the Consumer Protection Act. The meaning of the terms ‘sale’¹, and ‘goods’² is to be construed according to the Sale of Goods Act, and the meaning of the term ‘consideration’³ is to be construed according to the Indian Contract Act.

Use of the Goods with the Approval of the Buyer –

When a person buys goods, they may be used by his family members, relatives and friends. Any person who is making actual use of the goods may come across the defects in goods. Thus the law construes users of the goods as consumers although they may not be buyers at the same time. The words “....with the approval of the buyer” in the definition denotes that the user of the goods should be a rightful user.

Example : A purchased a scooter which was in B’s possession from the date of purchase. B was using it and taking it to the seller for repairs and service from time to time. Later on B had a complaint regarding the scooter. He sued the seller. The seller pleaded that since B did not buy the scooter, he was not a consumer under the Act. The Delhi State Commission held that B, the complainant was using it with the approval of A, the buyer, and therefore he was consumer under the Act.⁴

Consumer Protection Act is for “Consumer”. The Act itself gives the definition of Consumer and only those who fall into the definition of Consumer given in Act can take

benefit of the Act. This definition is somewhat different than dictionary/literal meaning. It also specifically excludes some kind of consumers from its preview.

The definition of Consumer is given in two parts:

- 1) Consumer of Goods
- 2) Consumer of Services

The basic features of definition of consumer are:

- i) The Goods or Services must not be free. Some consideration (Price) should be paid for them. It includes purchase on credit or part payment or in installments.
- ii) Second important feature is that it is not necessary that the goods or services should be purchased by a person for himself only. Condition is that Goods/Services are bought for consideration. Definition of Consumer clearly states that any person though consideration is not paid by him but if he uses Goods with the consent of purchaser or is beneficiary is also a Consumer i.e. A purchases some goods and gifts them to B, here B is also a consumer. A telephone connection in the name of father used by son makes the son also a consumer.
- iii) Third important feature is that it excludes commercial dealings or goods purchased for resale from the definition of consumer with exception of goods and services purchased for self employment. It means reseller and commercial dealer except for self employment cannot take benefit of Consumer Protection Act. For more clarity one should know that it is not necessary that purchaser is commercial concern but such goods and services should be used for commercial purpose. For example if a commercial concern purchases a Car for the use of its own staff, it does not use that Car as a Taxi or hiring to others etc. then such use cannot be termed as commercial. The purchaser of such car though a commercial concern but here it is consumer because car is not used for commercial purpose.

The Supreme court in *Madan Kumar Singh v. Distt. Magistrate Sultanpur & Ors.*⁵ summarised the position as under:

The intention of Parliament is to exclude from the scope of definition, the persons who purchase goods for resale and also those who purchase goods with a view to use them for carrying any activity for earning. The immediate purpose as distinct from the ultimate purpose of purchase, sale in the same form or after conversion and a direct nexus with profit or loss would be the determinants of the character of transaction-whether it is for commercial purpose or not. Thus buyers for commodities or goods for self consumption in economic activities in which they are engaged would be consumers as defined in the Act.

3.2 Complaint

An aggrieved consumer seeks redressal under the Act through the instrumentality of complaint. It does not mean that the consumer can complain against his each and every problem. The Act has provided certain grounds on which complaint can be made. Similarly, relief against these complaints can be granted within the set pattern.

Complaint is a statement made in writing to the National Commission, the State Commission or the District Forum by a person competent to file it, containing the allegations in detail, and with a view to obtain relief provided under the Act.(S.2(1)(c)).

3.3 Complainant⁶

It means the following :

- a Consumer;
- any Voluntary Consumer Association;
- the Central Government;

- the State Governments or Union Territory Administration;
- one or more consumers , where there are numerous consumers having the same interest and
- in case of death of a consumer, his legal heir or representative.

At the outset it is clear that a person who can be termed as a consumer under the Act can make a complaint. To be specific on this account, following are the persons who can file a complaint under the Act as per sections 2(b) and 12:

- (a) a consumer; or
- (b) any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force, or
- (c) the Central Government or any State Government,
- (d) one or more consumers, where there are numerous consumers having the same interest.

In addition to the above following are also considered as consumer and hence they may file a complaint :

Beneficiary of the goods/services: The definition of consumer itself includes beneficiary of goods and services. In *K.B. Jayalaxmi v. Government of Tamil Nadu*⁷ it was observed that where a young child is taken to the hospital by his parents and the child is treated by the doctor, the parents of such a minor child can file a complaint under the Act⁸ -

Legal representative of the deceased consumer : The Act does not expressly indicate that the legal representatives of a consumer are also included in its scope. But by operation of law, the legal representatives get clothed with the rights, status and personality of the deceased. Thus the expression consumer would include legal representative of the deceased consumer and he can exercise his right for the purpose of enforcing the cause of action which has devolved on him.⁹ A legal heir of the deceased consumer can maintain a complaint under the Act.¹⁰

Husband of the consumer : In the Indian conditions, women may be illiterate, educated women may be unaware of their legal rights, thus a husband can file complaint under the Consumer Protection Act on behalf of his spouse.¹¹

Moreover, when a consumer signs the original complaint, it can be initiated by his/her relative.¹²

3.4 Complaint¹³: Meaning & Scope.

A complaint would include an allegation in writing made by the complainant that

- Any unfair trade practice or restrictive trade practice has been adopted by any trader.
- The goods bought or agreed to be bought suffer from one or more defects.
- Services hired /availed or agreed to be hired /availed suffer from deficiencies in any respect.
- That a trader has charged for the goods or services mentioned in the complaint, a price in excess of the stipulated price, or
 - (i) fixed by or under any law for the time being in force; or
 - (ii) displayed on the goods; or
 - (iii) displayed on any package containing such goods
- That goods or services which are hazardous to life and safety of the public are being offered to the public

The definitions of 'goods', 'services' and 'deficiencies' are given in the Act.

A complaint can be filed by¹⁴

- A consumer to whom goods are sold or delivered or agreed to be sold or delivered or such services provided or agreed to be provided,
 - Voluntary Consumer Organization,
 - the Central Government,
 - the State Governments or Union Territory Administration,
 - one or more consumers , where there are numerous consumers having the same interest.
- The definition of consumer is wide but only a consumer to whom goods are sold or

delivered or agreed to be sold or delivered or such services provided or agreed to be provided can file complaint. The definition as provided under Sec. 2(1) (b) is different from list of persons who can file complaint. The legal heirs or representatives of the deceased have been included in definition of 'complainant' by 2002 amendment but have not been specified in Sec. 12(1) as person who can file complaint which creates a doubt that he cannot file and can only continue as a complainant after the death of the original complainant.

A Complaint should contain the following information:

- (a) The name, description and address of the complainant;
- (b) The name, description and address of the opposite party or parties;
- (c) The facts relating the complaint and when and where it arose;
- (d) Documents 'if any' in support of allegations and
- (e) The relief which the complainant is seeking.

The complaint should be signed by the Complainant or his/ her authorized agent.

If a complaint is genuine and tenable, the following reliefs are available to the Consumers under the Act¹⁵:

- Removal of defects from the goods;
- Replacement of the goods;
- Refund of the price paid;
- Award of compensation for the loss or injury suffered;
- Order to discontinue and not to repeat unfair trade practice or restrictive trade practice;
- not to offer hazardous goods for sale;
- to withdraw hazardous goods from sale;
- to cease hazardous goods and desist from offering services which are hazardous in nature;
- if the loss or injury has been suffered by a large number of consumers who are not identifiable conveniently, to pay such sum (not less than 5% of the value of such defective goods or services provided) which shall be determined by Forum;

- to issue corrective advertisement to neutralise the effect of misleading advertisement;
- to provide adequate costs to parties.

3.5 Service: Conceptual Analysis

The above stated reliefs are available in respect of the defective goods or services. Section 2(1)(o) of the Act provides that “service” means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

The definition provides a list of eleven sectors to which service may pertain in order to come under the purview of the Act. The list of these sectors is not an exhaustive one. Service may be of any description and pertain to any sector if it satisfies the following criteria:

1. service is made available to the potential users, i.e., service not only to the actual users but also to those who are capable of using it.
2. it should not be free of charge, e.g., the medical service rendered free of charge in Government hospital is not a service under the Act;
3. it should not be under a contract of personal service.

The Supreme court in *Kishori Lal v. Chairman E.S.I. Coproration*;¹⁶ held that:

The definition of service in section 2(1)(o) can be split into three parts: the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean service of any description which is made available to the potential users. The inclusionary part expressly includes the

provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, amusement to the purveying of news or other information, whereas the exclusionary part excludes rendering of any service free of charge; or under a contract of personal service. The exclusionary part of section 2(1)(o) excludes from the main part 'services' rendered (i) free of charge; or (ii) under a contract of personal service in the exclusionary part of section 2(1)(o) must be construed as excluding the services rendered by an employee to his employer under the contract of personal service from the ambit of expression 'service'.

When we talk about 'service' under the Consumer Protection Act, we take it as a regular commercial transaction. Thus the services rendered under the contract of personal service are specifically excluded from the definition.

The expression 'contract of personal service' is not defined under the Act. In common parlance, it means - a contract to render service in a private capacity to an individual. For example, where a servant enters into an agreement with a master for employment, or where a landlord agrees to supply water to his tenant, these are the contracts of personal service. The idea is that under a personal service relationship, a person can discontinue the service at any time according to his will, he need not approach Consumer Forum to complaint about deficiency in service.

There is a difference between 'contract of personal service' and 'contract for personal service'. In case of 'contract of personal service', the service seeker can order or require what is to be done and how it should be done. Like a master can tell his servant to bring

goods from a particular place. But in a 'contract for personal service', the service seeker can tell only what is to be done. How the work will be done is at the wish of the performer. When a person gives a suit to the tailor for stitching, he does not tell him which method he should use to stitch it. A 'contract of personal service' is excluded from the definition of service, 'contract for personal service' is recognised as service under the Act.

It does not make any difference whether the service provider is a Government body or a Private body. Thus even if a statutory corporation provides a deficient service, it can be made liable under the Act. For example, A applied for electricity connection for his flour mill to Rajasthan State Electricity Board. The Board delayed in releasing the connection. It was held that the Board was deficient in performing service.

The Supreme court¹⁷ laid down the distinction between "contract of service" and "contract for service"

There is a distinction between a 'contract of service' and 'contract for service'. A 'contract for service' implies a contract whereby one party undertakes to render service e.g. professional or technical service, to or for another in the performance of which he is not subject to detailed direction and control and exercises professional or technical skill and uses his own knowledge and discretion, whereas a 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. A contract of service is excluded for consideration from the ambit of definition of 'service'

in the CP Act, whereas a contract for service is included.

Some other sectors/professionals/services which are not specified in the definition of service but which have been considered by the Consumer Forums as service sectors from time to time are listed below:

Advocates, Airlines, Chartered Accountants, Courier, Chit Fund, Education, Gas Cylinder/LPG, Medical services, Postal services, Railways, Investment related services, and Telephone services. Thus, the test is - whether the person against whom the complaint is made performs a service for consideration which is sought by a potential user.

3.6 “Deficiency” In Service

Section 2(1)(g) of the Act provides that, “deficiency” means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

Reading the above definition by breaking it into elements, we get—

- (a) “deficiency” means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance

Examples :

1. A boarded a train. The compartment in which he and his wife travelled was in a bad shape-fans not working, shutters of windows were not working, rexin of the upper berth was badly torn and there were rusty nails which caused some injuries to the wife of A. A made a complaint against the railway department. It was held that the complaint constituted ‘deficiency in service’ and the compensation of Rs. 1500 was awarded to A.¹⁸

2. Dr. A treated P under Allopathic system, though he himself was a Homoeopathic practitioner. Later on P alleged A for wrong treatment. The Commission held it as deficiency in service.¹⁹

3. A booked a car for B and promised to deliver it within one month of booking. The car was not delivered even after four months. Here A could be held liable for deficiency in service.

One interesting aspect is that deficiency in service should occur during the happening of performance. Thus it is crucial to determine when the performance of a service commenced. For example, A contracted with B to supply, erect and commission cold rolling mill. A supplied the mill, but failed to erect and commission the mill. B filed a suit alleging deficiency of service on A's failure to erect and commission the mill. The National Commission observed that the deficiency must pertain to performance of service. Since A never started erecting and commissioning the mill, the question of performance did not arise. Thus the case is not that of deficiency of service.²⁰

(b) The quality and manner of performance of service should have been required to be maintained by or under any law for the time being in force or undertaken to be performed by a person in pursuance of a contract or otherwise. For example, A, the builder, promised under written agreement to provide a flat to B. Subsequently he expressed his inability to give possession of the flat and entered into a fresh agreement to pay Rs. 9,51,000 to B in place of flat. A didn't even pay this money. B sued A. The Commission held that since A had not even paid the money as per subsequent contract, the rights of earlier contract can be involved by B and that there was a deficiency of service on part of the builder.²¹

(c) The deficiency must be in relation to a service - The words '....in relation to any service' in the definition signifies that the deficiency is always in terms of service. Thus if the grievance pertains to a matter which does not fall in the definition of service, the concept of deficiency would not apply. For example, A deposited Rs.

100 with B as application fee and executed bond for the purpose of drilling tube well. A did not drill the tubewell because it was not feasible. B alleged deficiency in service. It was held that depositing Rs. 100 as application fee and executing a bond do not amount to hiring of services, thus the deficiency of service cannot be complained in the matter.²²

(a) Deficiency in service due to circumstances beyond control

In normal course, if the service is found deficient as per the above criteria, it is held deficient and the compensation is awarded. However there may be abnormal circumstances beyond the control of the person performing service. If such circumstances prevent a person from rendering service of the desired quality, nature and the manner, such person should not be penalised for the same. For example, A undertook to supply water to B for irrigation of crops. Due to power grid failure of the State, A could not get sufficient power to perform the service. Here A cannot be held liable for deficiency in service.

However, negligence on the part of performer may not be excused under the cover of circumstances beyond control. For example, A agreed to supply water to B for irrigation of crops. He failed to do so because of a power breakdown due to burning of transformer. As a result crops were damaged. B sued A for providing deficient service. The National Commission held that it was duty of A to get the transformer repaired immediately. Since he was negligent in doing so, he is liable for the deficiency in service.²³

The Supreme Court in *Managing Director, Maharashtra State Financial Corporation and others v. Sanjay Shankarsa Mamarde*,²⁴ held:

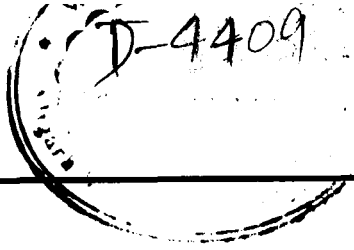
It is manifest from the language employed in the clause that its scope is also very wide but no single test as decisive in the determination of the extent of fault, imperfection, nature and manner of performance etc. required to be maintained can

be laid down. It must depend on the facts of the particular case, having regard to the nature of the 'service' to be provided.

Conclusion

The CPA was passed with avowed objectives. It is intended to provide justice which is "less formal, and involves less paper work, less delay and less expense". The CPA has received wide recognition in India as poor man's legislation, ensuring easy access to justice. However, the CPA simply gives a new dimension to rights that have been recognized and protected since the ancient period. Consumer protection laws are designed to ensure fair competition and the free flow of truthful information in the marketplace. The laws are designed to prevent those businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and may provide additional protection for the weak and those unable to take care of themselves.

The definitional part under the Consumer Protection Act may be regarded as exhaustive and the Judiciary has time and again construed the definitions to serve the real purpose of the Act, i.e. protection of consumer who has a weaker bargaining power against the huge corporation. Though, the Act has been amended more than two times but there are certain things which should be included in the definitional part of the Act by way of an amendment. Certain ambiguities relating to the jurisdiction of the consumer fora and relating to the telecom company cases are there. Furthermore, the apex court should clearly set the guidelines regarding the above said cases to avoid the chaos and confusion, so that the poor consumers may not be victimized anymore and have the sigh of relief.



REFERENCES

1. [section 4(1)] Sale of Goods Act 1930. "Contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another" ..
2. [section 2(7)]. Sale of Goods Act 1930. Goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale
3. According to Section 2(d), Indian Contract Act, 1872. Consideration is defined as: "When at the desire of the promisor, the promisee has done or abstained from doing, or does or abstains from doing, or promises to do or abstain something, such an act or abstinence or promise is called consideration for the promise. "
4. *Dinesh Bhagat v. Bajaj Auto Ltd.* (1992) III CPJ 272.
5. 2009(7)SCJ 558. (2009)9 SCC 79.
6. CPA Sec 2 (1)(b).
7. 1994(1) CPR 114.
8. *Spring Meadows Hospital .v. Harjot Ahluwalia* JT 1998(2) SC 620.
9. *Cosmopolitan Hospital v. Smt. Vasantha P. Nair* (1) 1992 CPJ NC 302.
10. *Joseph Alias Animon v. Dr. Elizabeth Zachariah* (1) 1997 CPJ 96.
11. *Punjab National Bank, Bombay v. K.B. Shetty* 1991 (2) CPR 633.
12. *Motibai Dalvi Hospital v. M.I. Govilkar* 1992 (1) CPR 408.
13. CPA Sec 2(1) (c).
14. *Ibid* Sec 12 (1).
15. *Ibid* Sec 14 (1).
16. 2007(4) SCJ 465: AIR 2007 SC 1819.

17. *Supra*, 13.
18. *General Mngr, South Eastern Railway v. Anand Prasad Sinha* [1991] CPJ 10 (12) NC.
19. *Poonam Verma v. Ashwin Patel* [1996] II CPJ 1 SC.
20. *Jaipur Metals & Electricals Ltd.v. Laxmi Inds* [1991] II CPJ 602 (NC).
21. *Lata Construction v. Dr. Rameshchandra Ramniklal Shah* AIR 2000 SC 380 (384).
22. *Mangilal v. Chairman District Rural Development Agency* [1991] 1 CPJ 474 (Raj.)
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24. 2010(6) SCJ 598: AIR 2010 SC 3534.

CHAPTER 4

TELECOM INDUSTRY IN INDIA AND CONSUMER PROTECTION

Introduction

The Republic of India possesses a diversified communications system that links all parts of the country by Internet, telephone, telegraph, radio, and television. Most of the telecommunications forms are as prevalent or as advanced as those in modern Western countries, and the system includes some of the most sophisticated technology in the world and constitutes a foundation for further development of a modern network. India has the world's second-largest mobile phone users with over 903 million as of January 2012.¹ It has the world's third-largest Internet users with over 121 million as of December 2011.² India has become the world's most competitive and one of the fastest growing telecom markets.³ The industry is expected to reach a size of 344,921 crore (US\$68.81 billion) by 2012 at a growth rate of over 26 per cent, and generate employment opportunities for about 10 million people during the same period. According to analysts, the sector would create direct employment for 2.8 million people and for 7 million indirectly.⁴ The total revenue of the Indian telecom sector grew by 7% to 283,207 crore (US\$56.5 billion) for 2010–11 financial year, while revenues from telecom equipment segment stood at 117,039 crore (US\$23.35 billion).⁵ In this chapter an attempt has been made to examine the importance of telecom sector in India's economy vis a vis protection of interest of consumers.

4.1 Industry Overview

The Indian Telecommunications network is the third largest in the world and the second largest among the emerging economies of Asia. Today, it is the fastest growing market in the world. The telecommunication sector continued to register significant success and has emerged as one of the key sectors responsible for India's economic growth. This rapid growth has been possible due to various proactive and positive decisions of the Government and contribution of both the public and the private sector. The rapid strides in the telecom sector have been facilitated by liberal policies of the Government that provide easy market access for telecom equipment and a fair regulatory framework for offering telecom services to the Indian consumers at affordable

prices. The development of world class telecommunication infrastructure is the key to rapid economic growth and to bring social change of the country. Indian telecommunication sector has undergone a major process of transformation through significant policy reforms, particularly beginning with the announcement of National Telecom Policy (NTP) 1994 and was subsequently re-emphasized and carried forward under NTP 1999. Driven by various policy initiatives, the Indian telecom sector witnessed a complete transformation in the last decade. It has achieved a phenomenal growth during the last few years and is poised to take a big leap in the future also. Such rapid growth in the communication sector has become necessary for further modernization of Indian economy through rapid development in Information Technology. Keeping in view the importance of the sector, an increasing provision of outlays has been made in the successive Plans. During the Ninth Plan and Tenth Plan, an outlay of Rs.47280 crore and Rs.98968 crore were allocated for the communication sector.⁶

4.2 Regulatory Framework

The Telecom Regulatory Authority of India (TRAI) was established in 1997 through an Act of Parliament, viz., the Telecom Regulatory Authority of India Act, 1997. Telecom Regulatory Authority of India's mission is to ensure that the interests of consumers are protected and at the same time to nurture conditions for growth of telecommunications, broadcasting and cable services in a manner and at a pace which will enable India to play a leading role in the emerging global information society. For achieving these objectives, the Authority issues from time to time regulations, directions, orders or guidelines with the focus on:

- Transparency in decision making by affording an opportunity to all stakeholders.
- Providing consumer with adequate choice, affordable tariffs and high quality of service.
- Promoting level playing field and fair competition among service providers.

- Access to world class quality telecommunications, broadcasting and cable services.
- Promoting efficiency in operations in all the tiers of the industry.
- Adoption of emerging technologies within the framework of a technology neutral policy.
- Ensuring technical compatibility & effective interconnection between service providers.

TRAI gives highest importance for consumer protection as it is embodied in the preamble to the Act, which reads: - “An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of telecom sector to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto.”

The framework for consumer protection, mandated as one of the functions of TRAI under the TRAI Act, is as under: -

“Lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service.”⁸

4.3 Telecom Disputes Settlement and Appellate Tribunal (TDSAT)

Under the TRAI Act, the authority responsible to settle disputes between a service provider and a group of consumers is the ‘Telecom Disputes Settlement and Appellate Tribunal’ (TDSAT) set up by the Central Government. TDSAT came into existence in May, 2000. The relevant provisions in the Act regarding settlement of disputes are reproduced below:–

“The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to –

(a) Adjudicate any dispute –

(i) Between a licensor and a licensee;

(ii) Between two or more service providers;

(iii) Between a service provider and a group of consumers;

Provided that nothing in this clause shall apply in respect of matters relating to

–
(A) The monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969;)

(B) The complaint of an individual consumer maintainable before a Consumer Dispute Redressal Forum or a Consumer Dispute Redressal Commission of the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986;)

(C) The dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 (13 of 1885;)

(b) Hear and dispose of appeal against any direction, decision or order of the authority under this Act.”⁹

4.4 Telecom Consumers Protection and Redressal of Grievances

Regulations, 2007 (3 of 2007)

There is no provision in the TRAI Act for redressal of individual consumer complaints by the Authority. As per the TRAI Act, individual complaints are maintainable before the consumer disputes redressal fora/commissions established under Consumer Protection Act of 1986. Taking cognizance of the fact that going to a dispute redressal forum or commission is time consuming and also costly compared to the telecom issues at stake, the Authority, through the Telecom Consumers Protection and Redressal of Grievances Regulations, 2007, has sought to establish an institutional mechanisms for resolution of consumers’ grievances, within the company, at the level of Call Centre, Nodal Officer and appellate authority.

The salient features of the Regulations are:-

a. Provision of Call Centre

- i. The first level for the consumers to register their complaint is the Call Centre.
- ii. Consumers can contact the Call Centre of service provider on toll free numbers.
- iii. The Call Centre has to communicate the docket number of the complaint to the consumer after registration.
- iv. Complaints pertaining to fault repair, service disruption and disconnection of service have to be attended within a maximum period of 3 days.
- v. Other complaints to be attended by the Call Centre within a maximum period of 7 days, subject to time limits laid down in Regulations on Quality of Service.
- vi. The Call Centre has to intimate the action taken on the complaint and also the contact details of the Nodal Officer (including his name, telephone no. and address) to the customer.

b. Provision of Nodal Officer

- i. In case the consumer is not satisfied with the redressal of his grievance at the Call Centre level or in case the Call Centre does not attend to the complaint within the prescribed time limit, he can approach the Nodal Officer for redressal of his grievance.
- ii. All grievances received by the Nodal Officer with respect to fault repair, service disruption and disconnection of service to be got redressed within a maximum period of 3 days.
- iii. Other grievances are to be redressed by the Nodal Officer within a maximum period of 10 days of the registration of the grievance.
- iv. Nodal officer has to communicate within three days from date of the receipt of the complaint, the unique complaint number to the consumer.
- v. Intimate the consumer about the resolution or decision thereon within the time limit specified.

c. Provision of Appellate authority

i. In case the consumer is still not satisfied with the redressal of his grievance by the Nodal Officer or in case his complaint is not redressed by the Nodal Officer within the time limit specified or no reply is received regarding resolution of the complaint from Nodal Officer, he can appeal to the appellate authority of the service provider for redressal of his grievance.

ii. Appellate Authority has to decide every appeal within 3 months.¹⁰

4.5 Advertisements

Advertising means the act or practice of calling public attention to one's product, service, need, etc., especially by paid announcements in newspapers and magazines, over radio or television, on billboards, etc. to get more customers.¹¹ One definition of advertising is: "Advertising is the nonpersonal communication of information usually paid for and usually persuasive in nature about products, services or ideas by identified sponsors through the various media."¹² It is very important for every industry to improve its public image. This is especially important for the advertising profession, an industry that has great visibility. Unfortunately, there is a considerable amount of evidence that the public is quite annoyed with the advertising industry.¹³ Even advertising executives are concerned about the large number of bad advertisements. The industry continues to work on improving its image and curbing abuses. The more the advertising industry knows about how it is viewed by the public, the easier it will be for the industry to improve its image. Research by Storholm and Friedman (1989) demonstrates how an understanding of the myths and unethical practices of direct marketing professionals about their industry could be used to better the image of that industry¹⁴.

(a) Legal and Ethical Aspects of Advertising

Advertising reflects contemporary society. The making of an ad copy, its message, its illustrations, the product advertised, the appeal-used all these have a social flavour. Advertising affects society and gets affected by it. It is therefore, necessary to use this weapon with caution to avoid a corrosive effect

on social values. Consumers are exposed to hundreds of commercial messages per day in one form or another -- from the boring, copy-laden radio commercial to the easily skimmed, forgettable newspaper ad, and from the billboard on the side of the bus to the logo on the side of the building.¹⁵

(b) When is advertising deceptive-

The Constitution of India guarantees freedom of speech. Special restraint is needed in commercial speech including advertising. It is interesting to note that there is a slight difference in the degree to which the constitutional guarantee of freedom of speech and expression can be enjoyed by the advertising industry as compared to other branches of the mass media. Article 19 (1) [a] states simply "All citizens shall have the right to freedom of speech and expression". The companion Article 19(2) qualifies this right by providing that the State can impose reasonable restrictions on its exercise "in the interest of the sovereignty and integrity of India, friendly ties with foreign states, public order, decency and morality or in relation to contempt of court, defamation or incitement to an offence".¹⁶ As far back as 1960, the Supreme Court, in the case *Hamdard Dawakhana v. Union of India*,¹⁷ ruled that a distinction needed to be made between commercial advertising and advertising aimed at expression and propagation of ideas. It was only the latter form of advertising, opined the apex court, that could legitimately claim the full protection of Article 19 (1) [a]. The effect of the Supreme Court judgement thus is that although an advertisement is a form of speech, its true character is reflected in the object for the promotion of which it was employed. The right to publish and distribute a commercial advertisement, promoting an individual's personal business is not a part of the freedom of speech guaranteed by our Constitution. The apex Court in another case, *Tata Press v. Mahanagar Telephone Limited and Others*,¹⁸ commenting on the role of advertising observed that low prices for consumers were dependent upon mass production, mass production was dependent upon volume sales and volume sales were dependent upon advertising. The Supreme

Court, in that case in 1995, concluded that 'commercial speech' cannot be denied as a right to a person because that person was a businessman. While setting aside the judgement of the Bombay High Court in the matter, the three judge bench of Justices Kuldeep Singh, B L Hansalia and S B Majumdar said "...the public at large has the right to receive the 'commercial speech'. Article 19(1) (a) not only guarantees freedom of speech and expression, it also protects the rights of an individual to listen, read and receive the said speech". The bench further said. "The protection of Article 19 (1) [a] is available to the speaker as well as to the recipient of the speech. The recipient of 'commercial speech' may be having a much deeper interest in the advertisement than the business man who is behind the publication". The apex court further observed that advertising as a commercial speech had two facets. "Advertising which is no more than a commercial transaction is nonetheless a commercial dissemination of information regarding the product advertised. The public at large is benefited by the information made available through the advertisement".

To scrutinize certain principles and fairness in the sphere of advertising, Advertising Standards Council of India (ASCI) was established in India in 1985. ASCI deals with complaints received from consumers and industry against such advertisements which are false, misleading, indecent, illegal, leading to unsafe practices or unfair to competition and are in contravention to the advertising code¹⁹. Even though there is no as such provision for regulating advertisement policy in the Constitution of India, which should be adopted by press or media, the Supreme Court has given guidelines for the same through a series of decisions²⁰. Consumer Protection Act, 1986 provides better protection of the interests of consumers and to make provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected to it, including protection against unfair trade practices.²¹

India is one of the very few countries in the world besides Singapore to have legislated Cyber laws.²² The Information Technology Act, 2000 specifically empowers that anyone who publishes in the electronic form, any material which is lascivious or which tends to degrade persons who are likely to read, see or hear the matter contained or embodied in it, shall be punishable with imprisonment and fine²³. Even there is a provision in the IT Act, which applies to any offence by which any person shall be punished irrespective of his/her nationality if the act constituting the offence involves a computer, computer system or computer network located in India²⁴. As per the provisions of Indian Penal Code, 1860 certain advertisements are considered as criminal offences. It is dealt under different provisions of the Code²⁵. The Young Persons (Harmful Publications) Act, 1956 prevents the dissemination of certain publications harmful to young persons. To be precise harmful publication indicates such publication which would tend to corrupt a young person whether by inciting or encouraging him to commit offences. The Act also proclaims that whoever advertises or makes known by any means that any harmful publication can be procured from or through any person, he shall be punished with imprisonment or with fine, or with both²⁶.

Indecent Representation of Women (Prohibition) Act, 1986 prohibits indecent representation of women through advertisements²⁷ or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto. The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 states that no person shall advertise for the distribution, sale or supply of cigarettes, and also shall not take part in the publication of such advertisement, unless the specified warning is included in such advertisement²⁸. The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (DMRA) controls the advertisement²⁹ of such drugs which are said to provide magical remedies and to deal with other matters relating to it.

As per the Drugs and Cosmetics Act, 1940 (DCA), no person shall himself or by any other person on his behalf offer for sale³⁰ any drug or cosmetic which is not of a standard quality, or is misbranded, adulterated or spurious. The Act gives similar restrictions to advertisements for traditional drugs such as Ayurvedic, Siddha and Unani. The Emblems and Names (Prevention of Improper Use) Act, 1950 is enacted to prevent the improper use of certain emblems³¹ and names, for professional and commercial purposes³². In the exercise of the powers conferred by section 30 of the Securities and Exchange Board of India (SEBI) Act³³, 1992, the Board makes the regulations on the code of conduct for Stock-brokers to be known as SEBI Stock-brokers and Sub-brokers Rules in 1992. The provisions of the Rules specified that a stock-broker or sub-broker is prohibited from advertising his business publicly unless permitted by the stock exchange, including in their internet sites, by its subsidiaries, group companies etc. The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, contains provision³⁴ which prohibits advertisements relating to predetermination of sex. The Act provides for the prohibition of advertisements of any kind for anybody or person pertaining to facilities for pre-natal diagnosis of sex available at any centre or place. The Transplantation of Human Organs Act, 1994 provides for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs and for matters relating to it³⁵ and provisions are there for the punishment for commercial dealings in human organs.³⁶ While detailing the provisions of the Representation of the People (Amendment) Act, 1951 (RPA)³⁷, it is observed that during the period of forty-eight hours before the conclusion of the poll for any elections in that polling area, a person shall not display to the public any election matter by means of cinematograph, television or other similar apparatus³⁸. The statute provides penalty for anyone including the advertisers who contravene the above provision with imprisonment or fine or with both.

The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992³⁹ as Amended in 2003 regulates the production, supply and distribution of infant milk substitutes, feeding bottles and infant foods with a view for protecting and promoting breastfeeding and for the matters relating to it including advertisement⁴⁰ of the same⁴¹. The Competition Act, 2002 provides prohibition of certain agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or is likely to cause an appreciable adverse effect on competition within India⁴².

The provisions of Trademarks Act, 1999 clearly emphasize that the following are considered as trademark infringement if it is advertised in such a way as to⁴³:-

- a) take unfair advantage of and is contrary to honest practices in industrial or commercial matters; or
- b) is detrimental to its distinctive character; or
- c) is against the reputation of the trade mark.

Thus if used properly and without any malafide intention, then comparative advertisement can prove beneficial otherwise that may mislead consumers resulting into irreparable loss as well as legal battles⁴⁴. As per the Contract Act, 1872, the advertisements for gambling, lottery and prize games have held to be wagering contracts and thus void and unenforceable⁴⁵, are prohibited in India. While reading the provisions of the Act along with the ASCI guidelines it is understood that even the incorporation of a visual representation of such gaming room or table could be construed as indirect advertisement.⁴⁶ The Civil Defence Act, 1968 gives power to the Central Government to make rules for securing civil defence⁴⁷ for prohibiting the printing and publication of any book or other document containing matters prejudicial to civil defence⁴⁸. Rules could also be made for demanding security from any press used for the purpose of

printing/publishing of any book or other document containing matters prejudicial to civil defence⁴⁹. Service providers often tack on the fees and surcharges that are not disclosed to the customer in the advertised price. One of the most common is for activation of services such as mobile phones, but is also common in broadband, telephony, gym memberships, and air travel. In most cases, the fees are hidden in fine print, though in a few cases they are so confused and obfuscated by ambiguous terminology that they are essentially undisclosed. Hidden fees are frequently used in airline and air travel advertising.⁵⁰ Many colleges misrepresent in their prospectus that the institution is affiliated to a particular university and an accredited one. In one of the cases decided in 1995, the complainant daughter took admission in B.Pharm course believing representations made in prospectus that college was recognized by the Pondicherry University. The fee was paid in addition to Rs. 25,000/- towards donation. Subsequently on notice issued by the University Administration it transpired that the course was not affiliated and the student was stranded at cross roads of her career. It was held that there was deficiency in service and unfair trade practice on the part of opposite party, compensation of Rs. 30,000/- was granted.⁵¹

In *Bhupesh Khurana v. Vishwa Buddha Parishad*,⁵² a class action suit was filed by twelve students who had joined the BDS course offered by the Buddhist Mission Dental College run by Vishwa Buddha Parishad. The students' complaint was that the college, in its advertisement and prospectus inviting applications for the course, had given the impression that it was affiliated to Magadh University, Bodh Gaya nor recognized by the Dental Council of India and was fully equipped to give the degree of Bachelor of Dental Science. However, after joining the college and attending classes, the students found to their dismay that the annual examinations were not being held because the college was neither affiliated to Magadh University, Bodh Gaya nor recognized by the Dental Council of India. As a result the students lost two precious academic years, but also spent money on fees, hostel charges,

etc. Holding the college to be deficient the National Commission directed it to refund the admission expenses of all the twelve students along with interest of 12 percent.

Companies advertise products highlighting health cures and drugs of questionable efficacy and health gadgets of unknown values. One of the instances is that tempted by an advertisement, claiming to increase a person's height, Nadiya, a Class VIII student having a height of 135 cms got admitted to Fathima Hospital for surgery, on 24-7-1996, for increasing her height. The surgery was conducted and a ring fixator was fixed on the legs which had to be adjusted every six hours. To her dismay Nadiya found her left leg shorter by ½ inches, and therefore she could not walk. By September 1996, the pain had increased and the complainant was bed-ridden till March, 1998. The Commission held the hospital and the doctors negligent and deficient in their service and directed them to pay Rs. 5,00,000 with costs amounting to Rs. 2,000 to the complainant.⁵³

(c) Puffery

It means the use of harmless superlatives. The advertisers use them to enhance the merits of their products (best, finest, number one, etc.). "Courts cannot continue to follow old English precedents, which recognised the right of manufacturers to indulge in puffery while advertising their products," the Madras High Court has said. Allowing an Original Application filed by Colgate-Palmolive against Anchor Health and Beauty Care, Justice V. Ramasubramanian said recognising such right of the manufacturers would amount to de-recognising the rights of the consumers."⁵⁴

A wrong number can rob you of your peace

A wrong number can rob you of your peace, Shipra Seth, a Gurgaon-based software professional, learnt this the hard way. A soft drink company printed her cellphone number "erroneously" in one of their advertisement campaigns

featuring actress Katrina Kaif. Shipra, 33, continuously received thousands of phone calls and obscene text messages addressing her as Katrina. The company's TV commercial being telecast since February says, "Katrina ka number label keandar." When she asked the firm to remove her number from the labels of their product, the company responded that they did not provide the number and so could not be held responsible if consumers dialed a wrong number. Shipra then collected labels sent to her by callers from different parts of the country in which her number was printed and slapped a legal notice on the company. TOI is in possession of the bill of Shipra's cell phone number and one of the labels of the soft drink company sent by a caller from Chennai in which the same number has been printed. The software professional said she was on medical leave since January 4th due to a chronic back pain and was advised bed rest. But the calls aggravated her health problem. She has not been able to sleep and is on medication.⁵⁵

4.6 Services

Traditionally Value Added Services (VAS) have been defined as enhanced services, which add value to the standard or core tele-services offering like voice calls and fax transmission. "Value added services are enhanced services, in the nature of non-core services, which add value to the basic tele services and bearer services, the core services being standard voice calls, voice/non-voice messages, fax transmission and data transmission." Examples of value added services include call related services like call waiting, call forwarding, multi party conferencing, voice mail; email, SMS, MMS etc. However, currently various Application Services (AS) are also being provided through telecommunications network. While services like SMS, MMS on mobile phones, and data access and call related services both on wire line and wireless were usually considered value added services, but in recent years SMS, MMS, call related services and data access have more and more become standard services, and VAS therefore has begun to exclude those services. Many more applications and services are being offered on telephone and these services

continue to evolve changing technologies. However, the term VAS continues to be used for all kinds of applications being offered through telecommunications network.⁵⁶ In India, SMS, Ringtones and Caller Ring Back Tones (CRBT) constitute bulk of the revenue from value added services provided by mobile telecom operators presently. However, there are innumerable application services like gaming, video and audio streaming, stock quotes, news, cricket updates, tele-voting, chatting, etc that are getting popular. Each service differs in content, cost and demand and is customized for different segment of consumers. With the introduction of 3G and Broadband Wireless Access (BWA) services this is going to change in a big way as high bandwidth multimedia content services, mobile TV, online gaming and utility applications like e-governance, e-commerce, e-education, e-health will push the demand for applications and services as well as innovations in applications and services products offering.⁵⁷“Value Added Services are enhanced services which add value to the basic tele services and bearer services for which separate licences are issued. At present, Government is issuing licences for following Value Added Services:-⁵⁸

- (i) Cellular Mobile Telephone Service (Public Land Mobile Network)
- (ii) Radio Paging Service
- (iii) Public Mobile Trunking Service
- (iv) Electronic mail
- (v) Voice Mail Service.
- (vi) Closed Users Group Domestic 64 kbps data network via INSAT satellite system.
- (vii) Videotex Service.
- (viii) Video conferencing

(ix) GMPCS

(x) Internet

(a) VAS and Consumer Protection Issues

A key consumer issue which has emerged in the recent times on provision of value added services is provisioning of value added service without explicit consent of the consumers. To address issues relating to provision of value added services and maintaining transparency thereto, TRAI has made the following provisions:

1. Through the Direction on Value Added Services dated 3rd May, 2005, the Authority mandated all the Cellular Mobile Service Providers and Unified Access Service Providers that no chargeable value added service shall be provided to a customer without his explicit consent. Any value added service, which was earlier being provided free of charge, shall not be made chargeable without the explicit consent of the customer.
2. Through the Direction on Premium Rate Services dated 3rd May, 2005, the Authority mandated all the Cellular Mobile Service Providers and Unified Access Service Providers to publish in all communications/ advertisements relating to premium rate services, the pulse rate/ tariff for the service.
3. Through the Direction dated 29th August, 2006 the Authority, inter-alia, directed all the Cellular Mobile Service Providers, Basic Service Operators and Unified Access Service Providers to acknowledge through SMS followed by entry in the next bill the requests made through Telephone call, FAX, SMS, e-mail etc for value added services, the charges for which are of a recurring nature;
4. Through the Direction dated 30th October, 2007 the Authority directed all the Access Service Providers (including M/s Bharat Sanchar Nigam Ltd. and M/s Mahanagar Telephone Nigam Ltd.) to -

- (a) provide within one month from the date of issue of this Direction, the facility to all their customers for registering their requests for unsubscribing of any value added service by such customers ---
 - (i) through e-mail or FAX or any other means (other than telephone calls and SMS);
 - (ii) through telephone calls and SMS made to the customer care/helpline/toll-free number (other than e-mail or FAX) without incurring of any cost for such telephone calls and SMS made by their customers;
- (b) continue to extend the facility referred to in the preceding sub-paragraph to their customers;
- (c) give adequate publicity to the facility, as referred to in sub-paragraphs (a) and (b) above, by publishing complete information about such facility on their websites and by communicating the same through SMS and other means to the customers;
- (d) ensure that-----
 - (i) in case of any offer for any value added service, made in writing or through SMS or FAX or e-mail,(other than tele-calling) to the customer, such offer shall contain all relevant details of the value added service offered to the customer including the charges for such value added service and seek and obtain the explicit consent of the customer, through telephone or SMS or FAX or e-mail or by other electronic means, for availing by such customers of such value added service, before activation of such value added service; and
 - (ii) in case of any offer for any value added service, made through tele-calling or by any other means [except means referred to in item (i) above] to the customer, such offer shall be subsequently made in writing or through SMS or FAX or e-mail, containing all relevant details of the value added service offered to the customer including the charges for such value added service and seek and obtain the explicit consent of the customer, through telephone or SMS or FAX or e-mail or by other electronic means for availing such value added service before activation of such value added service;

- (iii) the consent referred to in item (i) or item (ii), as the case may be, shall be acknowledged through SMS before activation of such value added service, or immediately after such activation, and also reflect the same in the next bill, if issued to the customer, giving relevant details of the said explicit consent;
- (e) keep complete records of such explicit consent obtained from the customer for subscription to the chargeable value added services and the records of the acknowledgements of such explicit consent by the service provider, for verification, for a period of one year from the date of such explicit consent.⁵⁹

4.7 Deficiency: Relevant Examples

Although there is a tremendous development with regard to the telecom sector in India, but still the consumers of telecom services are facing the brunt one way or the other. There is a plethora of complaints day in and day out regarding the deficiency of services against the telecom companies. It is only because of courts coming to the rescue of the poor consumers to save them from the exploitation at the hands of the big corporate, there is a long way to go when it can be said of surely that there are ample means to curb this menace. There are hundreds of cases regarding this subject matter but for the sake of precision following examples will suffice:

Court pulls up Reliance Info for false bills

A consumer court pulled up private telecom major Reliance Infocom for charging customers for calls that never "materialised" and levying STD tariff on local calls. It termed the actions as a "fraud" on consumers. Awarding a compensation of Rs 2,500 to a consumer, who suffered due to the apathy of Reliance Infocom, State Consumer Disputes Redressal Commission said: "No telephone service provider can be allowed to charge for the calls which have never materialized even after a ring of 10 to 15 seconds or charge STD rates for local calls."⁶⁰

Consumer Court issues notice to MTNL

A Delhi consumer court has sought explanation from MTNL on a complaint alleging that the state-owned telecom service provider was indulging in cheating and unfair trade practices on Trump pre-paid connection. Issuing notice to MTNL, the New Delhi Consumer Disputes Redressal Forum directed the top officers of the telecom major to answer the allegations made against it either personally or through their authorised agent on April 10. Advocate B K Biju had approached the forum complaining that on January 11, he bought a Rs 550 voucher for MTNL's pre-paid Trump mobile phone service, which was advertised as being valid upto two months with a talk-value of Rs 400.⁶¹

Tata Tele to pay Rs 7,500 for service deficiency

A city consumer court asked the telecom major, Tata Tele Services, to pay up Rs 7,500 as compensation to a person for disconnecting his telephone several times despite receiving the bill amount and not providing certain free facilities. The Delhi State Consumer Disputes Redressal Commission headed by Justice J D Kapoor and Member Rumnita Mittal held the telecom company guilty for depriving one Anish Kumar Jain from using his telephone for 15-days. "The telecom company in its offer had promised certain facilities which were free like voice mail service etc but, these were not provided," said the Commission adding that the consumer's service was disconnected for non-payment of bill and installation charges which was not true.

The order came on an appeal filed by the company against the order of a District Consumer Forum which, holding it guilty of "gross deficiency in services, had asked it to pay up the fine of Rs 22,500. This Commission, though upheld the District Forum's verdict, felt that compensation was slightly higher and decreased the amount to Rs 7,500.⁶²

Don't make unsolicited calls to cell users: HC

The Delhi High Court on Tuesday restrained telemarketers from making unsolicited calls to mobile phone users, irrespective of the fact whether or not they are registered with the DND facility. A bench comprising Justice Tirath

Singh Thakur and Justice Kailash Gambhir said if any telemarketer continues with such activities, it would be illegal and the consumers can move against telecom companies in the consumer court.⁶³

Consumer court concerned over billing by private telecom companies⁶⁴

The Delhi State Consumer Commission has expressed its concern over private telecom operators reportedly overcharging customers by including undue charges in the bill, which are not rectified unless the subscribers point them out. The Commission sought the help of the Telecom Regulatory Authority of India (TRAI) to inquire whether "mistakes" in the bill were unintentional or on purpose. It was hearing a petition filed by the private telecom operator Bharti Airtel seeking to set aside compensation of Rs 25,000 awarded by a Delhi District Forum to a consumer who had demanded a particular service which was not activated, but was charged for it. The company also charged money for free SMSes. "It has been mentioned by the forum that Bharti Airtel has been earning huge profits by inserting such charges in the bill which are not actually due, and when a protest is lodged, it rectifies the error and makes adjustment in the bill, as has been done in this case." The forum rightly pointed out that this amounts to unjust enrichment and dishonest practice. "It needs, however, a thorough enquiry by the TRAI to ascertain this circumstance and we believe that it will do so in public interest," the Commission Bench, comprising President Justice B A Zaidi and Member Salma Noor, said.

Conclusion

The above instances are merely a few examples to show how consumers are being exploited by telecom industry. The Indian Telecommunications network is the third largest in the world and the second largest among the emerging economies of Asia. Today, it is the fastest growing market in the world. The telecommunication sector continued to register significant success during the year and has emerged as one of the key sectors responsible for India's economic growth. This rapid growth has been possible due to various proactive and positive decisions of the Government and contribution of both by the

public and the private sector. Telecom industry in India is of a great importance to the nation in terms of a tool of information and a generator of economy as well. Due to the rapid changes and developments in the information technology and in the telecommunication itself throughout the whole world, there is a need to be dynamic in terms of infrastructure and regulation of the industry. There is a tremendous growth in the telecom sector in India during the last two decades but the in terms of regulation of the industry and particularly consumer protection we are lagging behind. There is a dire need to change laws relating to the industry and a viable machinery to protect the poor consumers. Another area of concern is that there are no effective privacy law and data protection laws in India. Essential and private details of telecom consumers are openly available for sale in the markets. Telemarketing companies purchase this information and use the same without any fear of punishment as there are no deterrent rules or regulations in this regard. The consumer protection law of India needs a fine tune keeping in mind the telecom disputes.

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of *Indian Penal Code, 1860*; Section 292 A (e), (d) of *Indian Penal Code, 1860*; Section 293 of *IPC, 1860*; Section 294 A of *IPC, 1860*, Section 153 A of *IPC, 1860*, Section 153 B of *IPC, 1860*

26. Section 3 of the *Harmful Publications Act, 1956*

27. Section 2(a) of the *Indecent Representation of Women (Prohibition) Act, 1986* defines advertisement- "Advertisement" includes any notice, circular, label, wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas.

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29. Section 2(a) of the *Drugs and Magical Remedies (Objectionable Advertisements Act), 1954* defines "advertisement" includes any notice, circular, label, wrapper, or other document, and any announcement made orally or by any means of producing or transmitting light, sound or smoke;

30. Section 18 of the *Drugs and Cosmetics Act, 1940*

31. Section 2(a) of the *Emblems and Names (Prevention of Improper Use) Act, 1950* defines emblem as any emblem, seal, flag, insignia, coat-of-arms or pictorial representation specified in the Schedule.

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39. The Act is named as *The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992* as Amended in 2003 (IMS Act) visit <http://www.bpni.org/documents/IMS-act.pdf>

40. Section 2(a) of *The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992* as Amended in 2003 (IMS Act): “advertisement” includes any notice, circular, label, wrapper or any other document or visible representation or announcement made by means of any light, sound, smoke or gas or by means of electronic transmission or by audio or visual transmission;

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CHAPTER 5

ROLE OF JUDICIARY

Introduction

The Indian judicial system is independent and impartial. Rather, this is the only pillar of Indian democracy in which all Indians have full faith and confidence. This faith is amply demonstrated by the fact that every day many new cases are being brought in courts all over the country. The Indian judiciary is thus one of the strongest pillars of Indian democracy.¹ An impartial judiciary is a sine-qua-non for the smooth functioning of a political system. It is the third organ of the government and is charged with the responsibility of deliverance of justice to the aggrieved party. The judiciary does not have a substitute in the present society.

In modern democratic political systems, the judicial system is known as open, impartial, consistent, stable and predictable. The judiciary operates in accordance with the prescriptions of the Rule of Law. Such judicial system believes in the fairness and openness of proceedings. Sometimes, to protect the interests of the State, certain restrictions may be put on the judicial system in the larger interests of the people, but there is seldom a deliberate attempt on the part of the State to abrogate the usual process and procedure of justice. In India also, the judiciary is taken, largely, as independent, impartial, fair and real protector of the rights and liberties of the citizens. In India, we have a unified structure of the judiciary despite the fact that our Constitution is quasi-federal. Under our Constitution, we have a single integrated system of courts for the Union, as well as, the states which administer both Union and state laws. The Indian judiciary is independent and separate from the government and the legislature. The judges of Indian courts have maintained very high standards of judicial integrity. This fact has also been recognized by the international business community. This is one of the main reasons that multinational corporations have been entering into joint ventures with Indian businesses and are investing billions of dollars in India to set up not only huge industrial units and develop town-ships, but also develop India's infrastructure.² At the apex we have the Supreme Court, below the Supreme

court we have the High Courts of the different states and under each High Court there is a hierarchy of other courts which are called Subordinate Courts. These are the courts which are subordinate to and under the control of the High Court. The role of Indian judiciary has also been constructive in protecting the rights of consumers.

5.1 Role of Judiciary in Consumer Protection

The courts have always had the power at general law to decline to enforce legal fights where it would be outrageous or offend good conscious to do so. The approach of the legal system to unconscionable conduct was demonstrated in *Commercial Bank of Australia LM v Amadio*³ in that case, a bank had taken security over the home of the parents of one of the bank's customers. The bank knew that the customer had approached his parents for help but had not explained the real risks of giving security to the bank. The bank also knew that the parents were not commercially sophisticated and that they did not have a good grasp of English. The court held the bank was not permitted to enforce its legal rights under the security arrangement because it would offend good conscience to do so. Mason J explained at :

Relief on the ground of unconscionable conduct will be granted when unconscientious advantage is taken of an innocent party whose will is overborne so that it is not independent and voluntary, just as it will be granted when such advantage is taken of an innocent party who, though not deprived of an independent and voluntary will, is" unable to make a worthwhile judgment as to what is in his best interest.

The courts recognised that a consumer could sue the manufacturer of negligently manufactured goods in *Donoghue v Stevenson*.⁴ in that case; a person purchased a bottle of drink from a retailer which had been manufactured

by someone else. The drink contained an impurity - a snail that had somehow made its way into the bottle during the course of the manufacturing process. The ultimate consumer of the drink became ill after drinking the contents of the bottle. Prior to the decision in *Donoghue*, a consumer who was injured by negligently manufactured products could only sue the person with whom he or she had a contract - such as the retailer. *Donoghue* permitted actions to be brought against the manufacturer. The decision in this case and the product liability regime recognised implicitly that the consumer and the retailer are not necessarily in a good position to assess and manage the risk associated with defective goods. These types of regulations have been justified on the grounds of public policy and 'dignity of profession'. The judiciary has reinforced these principles, which can be reflected in words of Justice Krishna Iyer, when he noted, "However over the years courts have recognized 'Legal Service' as a 'service' rendered to the consumers and have held that lawyers are accountable to the clients in the cases of deficiency of services."

In the case of *Srinath v. Union of India*,⁵ Madras High Court held that, in view of Sec. 3 of Consumer Protection Act, 1986. Consumer Redressal Forums have jurisdiction to deal with claims against advocates. Sec. 2 (U) of competition Act, 2002 defines the term 'Service' along the lines of consumer protection Act, 1986. Thus it may be concluded that legal services are becoming subject of trade related laws where consumerism and market forces should be given adequate space. The judgement of the Supreme Court in *Lucknow Development Authority v. M.K. Gupta*⁶ may be cited as an illustration. In the instant case the Supreme Court while establishing the jurisdiction of the Consumer Disputes Redressal Agencies created under the Consumer Protection Act emphasised that the service provided by a private body or a statutory or public authority are within the jurisdiction of the Consumer Protection Act. In this context, the Supreme Court also laid down that any defect or deficiency in such service would be treated as unfair trade practice and would amount to denial of service.

5.2 Protection of Consumer with reference to Telecom Industry

The telecommunications industry provides a unique vantage point through which to study the role of the judiciary in the evolution of government business relations for several reasons.⁷ First, the industry is emerging from total control by the government as a public sector industry. Second, it is a technologically dynamic industry that has attracted significant private sector interest within India as well as abroad. Third, it has experienced dramatic growth, even as the market structure has altered considerably. The telecommunications sector is generally touted as one of the most successful examples of market-oriented reform of the Indian public sector. At the same time, the industry is not the exclusive domain of the private sector and market competition because the government continues to play a major role. For example, the public sector continues to be a major telecommunications service provider (through the Bharat Sanchar Nigam Limited—BSNL). The Ministry of Communications in the Central Government continues to have important (and costly) development and social policy objectives—such as rural telephony.⁸ Moreover, the industry relies on a highly capital intensive network that acts as a barrier to market entry, that are characteristic of a “natural monopoly”. Therefore, there have been continuing efforts to establish a regulatory framework in this sector. The experience of the new regulator the Telecommunications Regulatory Authority of India (TRAI) has been contentious. The policy framework and the regulatory institutional structure have both changed over time. The establishment of the Telecom Dispute Settlement and Appellate Authority (TDSAT) was a major landmark. Finally, the judiciary has played a crucial role in shaping the structure and functioning of the regulatory apparatus by resolving disputes, demarcating jurisdictional boundaries and setting the rules of the game.⁹

In *General Manager, Telecom v. Consumer Disputes Redressal*¹⁰ the Kerala High Court held that the Consumer Protection Act, 1986 is a Special Law. Of course, Indian Telegraph Act also is a Special Law. But, between the said two Special Laws, the Consumer Protection Act is more special so far as the disputed question is concerned, because the Indian Telegraph Act deals with all

aspects of telephone system and apparatus, whereas the Consumer Protection Act deals with the dispute raised by the consumer as to the services rendered to them. Therefore, Consumer Protection Act is more special between the two. Applying the settled principle that Special Law will prevail over the 'general', the machinery set up under the Consumer Protection Act, 1986 to resolve the consumer disputes will prevail over Section 7-B of the Indian Telegraph Act.

5.3 Supreme Court stands up for rights of consumers

A judgement of the Supreme Court on 29 August, 2011, once for all settled the issue whether a consumer or an authorised Consumer Organisation Representative (ACOR) could represent consumers in the district consumer forum, state commission and national commission by clearly stating that an authorized representative has every right to represent, argue, appeal and perform all acts that are necessary. The Supreme Court hit the nail on the coffin of the efforts by traders and service providers, some district forum presidents, state commission presidents and most importantly the Bar Council of India to keep consumer representatives out and make this quasi-judicial tribunal a lawyers' forte.¹¹

In *S.B.Singh Gurjan v. Telecommunication Department Jodhpur*,¹² complainant was a subscriber of telephone and though he had not applied for STD/ISD connection these facilities were provided and he received unwanted bills for STD and ISD calls. The complainant received a huge bill for the month of March 1996 towards STD calls. The complainant lodged a complaint with the telephone department and a provisional bill was issued. Again in May 1996 the complainant received a bill for Rs.2, 15,186/- and after complaining a provisional bill was issued. No action was taken by the telephone department to disconnect the STD facility. The district Forum and State Commission dismissed the complaint. In the appeal National Commission held that so far as section 70 of the Contract Act is concerned the complainant could not be held liable for calls made by strangers.

In *Chief General Manager MTNL v. Consumer Rights Society*,¹³ telephone installed at the premises of the complainant was disconnected on the ground of non-payment of bills. Complainant pleaded in defence that MTNL did not issue the bills and that no bill was received by her. State Commission dismissed complaint. National Commission on application of facts found that the telephone was dead since 1992 and in spite of complaints not set right by MTNL. Ultimately since it was not set right no bills were issued. The respondent collected duplicate bills. On finding that rent has been charged for the period that the telephone was not functional she applied for revising the bills, and in the absence of response from the MTNL she filed a complaint before district forum after issuing notice to MTNL. National Commission upheld the order of the State Commission that found telephone department guilty of deficiency in service.

In *BSNL & Another v. P.D. Khanduri*,¹⁴ complainant had a telephone connection from the opposite party. The bills used to be around Rs. 2,000/- to Rs. 3,000/-. However a sudden spurt was noticed and complainant was given a bill of Rs. 72,877/- dated 11. 8. 2000. A complaint was filed before the District Forum and was allowed, directing the opposite party to settle the bills at Rs. 10,000/- and refund the excessive amount received from the complainant. An appeal filed before the State Commission was dismissed. National Council found that departmental instructions for dealing with cases of sudden spurt in bills had not been followed by the department and consequently the department was guilty of deficiency in service.

In *Telephone (General Manager) Chandigarh v. Director Regional Computer Center*,¹⁵ there was a sudden spurt in number of calls that were allegedly being made by complainant. Telephone department was obliged to inform user about the same. Bill of complainant had gone up from Rs. 32,000/- to Rs. 1 lakh in two months. Complainant had not been informed of such sudden spurt in use of phone. Investigation was not completed even after lapse of considerable time.

It was held that non compliance of its own instructions on subject of sudden spurt was the proof of deficiency in service. Opposite party was held liable.

In *Manager BPL Mobile Cellular Limited v. Asif Shaukat Qureshi*¹⁶

A subscriber had availed 'plan 0601' by which the cellular company offered monthly rental of Rs. 950/- incoming calls free for initial 12 billing cycles. The scheme was opened for new customers and even the old ones could merge. Later on, the bill showed charges for incoming calls which was raised by the company on the pretext that it had changed the 'Incoming Free Plan' to '400 Incoming Minutes Plan.' It was held that after taking the consent of the subscribers for a particular scheme, the cellular company cannot unilaterally change it to another scheme without giving prior notice to the subscribers.

While dealing with consumer cases, the Indian judiciary particularly the Supreme Court of India has given a wide and broad definition of the terms, in order to protect the rights of consumers against the strong corporations, thus furthering the social welfare object of the CP Act. For example, in *Trans Mediterranean Airways v. M/S Universal Exports*,¹⁷ the Supreme Court held:

The National Commission is a court and has jurisdiction to decide dispute raised against any international air carrier. The word court must be understood in the context of the body that is constituted in order to settle disputes and decide rights and liabilities of the parties before it. Courts are those bodies that bring about resolution to disputes between persons. Generally, the tribunals and Commissions do not fall within the definition of 'court'. However, in some situations the word 'court' may be used in a wide generic sense, and must in those cases be interpreted thus. The use of the word

‘court’ in Rule 29 of the second schedule of the Carriage by Air Act has been borrowed from the Warsaw Convention. The word ‘court’ has been employed to mean a body that adjudicates a dispute arising under the provisions of the Consumer Protection Act. The Consumer Protection Act gives the District Forums, State Forums and National Commission the power to decide disputes of consumers. The Consumer Forums can fall within the meaning of expression ‘court’.

Consumer Protection Act is one of the benevolent pieces of legislation intended to protect a large body of consumers from exploitation.¹⁸ The courts in India have time and again upheld the rights of consumers and furthered the object of the CP Act. e.g. Complainant's complaint that despite giving higher fare for business class, fixed seat was given which was not reclinable, and claim for refund of fare and compensation as not barred by Warsaw Convention.¹⁹ Theft of luggage and injury caused to complainant passenger by unauthorised passenger would be deficiency in service and under section 124 A of Railway Act, Railway Administration cannot escape liability.²⁰

Post office is liable for delay caused by negligence of its employee in the delivery of telegraphic money order; it cannot claim immunity under the provisions of the post office guide.²¹ The contention of post office that under section 48 of the Indian Post office Act, 1898 exemption was granted from any suit or legal proceedings in respect of delay or mis-delivery of the money order payment, etc; other than fraud or wilfull act or default of the officer, was turned down.²²

If the husband and wife have separate telephone connections, disconnection of the phone of the wife for default in the payment of the bill of the telephone

which was in the name of the husband, was deficiency in service.²³ Telephone getting frequently out of order is a deficiency in service.²⁴

Where the candidate appeared for Entrance Examination for registration for M.Phil and two years delay was caused by the University during which rules were changed and the complainant was debarred, the delay being unexplained, the university was made liable to register the complainant for M.Phil.²⁵ It has been held that institutions holding examination are not rendering any service within the meaning of CP Act 1986, hence any concomitant omission or commission of non-disclosure of results causing alleged loss of two years, cannot be termed as deficiency.²⁶ However, administrative aspects relating to Education are not excluded from definition of services, accordingly non supply of roll number because of which the complainant could not appear in the examination, resulting in loss of one year was held to be deficiency in service.²⁷

Global companies answerable to Indian consumer courts: SC

International companies are answerable to Indian consumer courts for service deficiency, the Supreme Court has ruled, upholding the consumer forum's direction to a Lebanese international courier company to pay 71,615.75 US dollars compensation to a Mumbai-based firm. A bench of justices G S Singhvi and H L Dattu said in a judgement that consumers within the definition of the Consumers Protection Act(CP) can avail remedy for deficiency in service from both consumer fora and regular courts.

"In our view, the protection provided under the C P Act to consumers is in addition to the remedies available under any other statute. It does not extinguish the remedies under another statute but provides an additional or alternative remedy."Further, we were not inclined to agree with the argument of Shri Bhagat that exercising jurisdiction was in contravention of international law as the Warsaw Convention and the Hague protocol have been incorporated into the domestic law by the passage of the Carriage by Air Act,1972.

"Therefore, we do not find any legal infirmity in the National Commission exercising its jurisdiction as the same can be considered a court within the

territory of a high contracting party for the purpose of Rule 29 of the Second Schedule to the CA Act and the Warsaw Convention,” Justice Dattu said writing the judgement. The apex court passed the judgement while dismissing the appeal filed by Trans Mediterranean Airways challenging the NCDRC(National Consumers Disputes Redressal Commission) direction to pay M/s Universal Exports the said amount as compensation and Rs one lakh fine for dispatching a consignment of garments to a wrong address in Spain in August 1992.²⁸

Consumer court concerned over billing by private telecom companies.

The Delhi State Consumer Commission has expressed its concern over private telecom operators reportedly overcharging customers by including undue charges in the bill, which are not rectified unless the subscribers point them out. The Commission sought the help of the Telecom Regulatory Authority of India (TRAI) to inquire whether "mistakes" in the bill were unintentional or on purpose. It was hearing a petition filed by the private telecom operator BhartiAirtel seeking to set aside compensation of Rs 25,000 awarded by a Delhi District Forum to a consumer who had demanded a particular service which was not activated, but was charged for it.

The company also charged money for free SMSes. "It has been mentioned by the forum that Bharti Airtel has been earning huge profits by inserting such charges in the bill which are not actually due, and when a protest is lodged, it rectifies the error and makes adjustment in the bill, as has been done in this case."The forum rightly pointed out that this amounts to unjust enrichment and dishonest practice. It needs, however, a thorough enquiry by the TRAI to ascertain this circumstance and we believe that it will do so in public interest," the Commission bench, comprising President Justice B A Zaidi and Member Salma Noor, said.

Taking note that the operator has accepted its mistake to complainant Nitin Jain, the Commission said "the district forum did not go wrong in raising doubts and suspicions about the genuineness of the error."

"Since there was an error in billing which has been accepted (by the company), Jain becomes entitled to damages and we would only say that damages are very honest," it said. The Commission said that the forum noted that the company was being unjustly enriched by levying unjustified charges in the bills."However, for the present we are aware only of one single case. We cannot handover a final verdict with regard to Bharti Airtel adopting dishonest practice of this nature," the Commission said. Jain received the bill for the month of March-April 2005 in which undue charges were levied with regard to a 'Hello Tune' service which was not provided to the customer and for free SMSes.²⁹

Don't make unsolicited calls to cell users: HC

The Delhi High Court restrained telemarketers from making unsolicited calls to mobile phone users, irrespective of the fact whether or not they are registered with the DND facility. A bench comprising Justice Tirath Singh Thakur and Justice Kailash Gambhir said if any telemarketer continues with such activities, it would be illegal and the consumers can move against telecom companies in the consumer court. The court passed the order on a contempt petition filed by Nivedita Sharma, saying that she had been getting unsolicited calls despite a consumer court order.

The high court had, however, earlier stayed the consumer court order, which imposed an exemplary fine of Rs 50 lakh on Airtel and COAI for failure to stop 'unnerving unsolicited' calls and SMS by telemarketing and banking companies to mobile phone users. The consumer court had also imposed a penalty of Rs 12.5 lakh each on ICICI and the American Express Bank for causing 'immense nuisance' by making unsolicited communications such as SMS. The high court said such calls should not be made to any consumer irrespective of whether one is registered with 'Do Not Disturb' registry as recommended by TRAI.³⁰

Mobile company fined over global roaming

A consumer forum imposed a fine of Rs 18,000 on a mobile service provider for having failed to activate international roaming service for one of its

customers, despite the customer having paid the deposit amount. The Central Mumbai District Consumer Disputes Redressal Forum held Vodafone Essar Ltd guilty of deficiency of service and directed it to pay Omprakash Bhadada (56) Rs 15,000 as compensation for mental agony and Rs 3,000 towards costs.³¹

Reliance Com to pay Rs 6,000 damages

Reliance Communications was asked to pay Rs 6,000 towards damages to a city-based practising advocate for deficiency in services. The district consumer court in its recent order directed the service provider to pay Rs 5,000 towards the mental trauma, and physical and financial losses incurred by Subhash Kharat and Rs 1,000 as litigation expenses.

Kharat had applied to Reliance Communications seeking conversion of his SIM card from CDMA to GSM mode. However, according to the complainant, the activation did not happen even after 25 days and in the meantime his CDMA card was deactivated. Kharat claimed in his petition that since he was not reachable, one of his clients Sanjay Chouhan, who was arrested by police, could not reach him and was jailed. The lawyer said that he had suffered a monetary loss of around Rs 1 lakh to Rs 1.5 lakh as his SIM card remained nonoperational. He approached the Reliance Communications for the same several times but the company did not pay any heed to his complaints. Kharat then approached the consumer forum seeking a compensation of Rs 1.50 lakh on account of the losses, besides Rs 3500 towards notice charges and Rs 15,000 as legal expenses from the company. The forum, headed by president R B Somani and member Jyoti Iyer, held that the service provider was responsible for deficiency in services but held that the advocate had failed to prove the losses he suffered on account of non-operation of the SIM card.³²

5.4 Position After “General Manager, Telecom v. M.Krishnan & Another

Hon’ble Supreme Court, in “General Manager, Telecom v. M.Krishnan & Another”,³³ in its judgement, pronounced on 1-9-2009, in an appeal No.7687 of 2004 filed by the BSNL, held that the Indian telegraph Act was a special law

and its provisions would prevail over a general law like the consumer Protection Act, 1986. "It is a settled law that general law must yield to special law", observed the bench and noted that there was a remedy prescribed under section 7B of the telegraph Act for resolution of all the disputes regarding telecom through arbitration. The bench said since there was a specific remedy prescribed, it would oust the jurisdiction of consumer courts.

But, in a consumer complaint filed before the Hon'ble District Forum, Ferozepur, Punjab, decided on 11-9-2009, the Forum held that a subscriber of telephone/mobile phone connection has a right to approach the Consumer Fora established under the Consumer Protection Act for the redressal of their grievances as the Consumer Protection Act is a special legislation enacted for the protection of consumer rights, in spite of the fact that the counsel for BSNL contested the case on the ground that the Consumer Forum has no jurisdiction to entertain a dispute relating to telecommunications services in view of the recent Judgement of the Supreme Court in *General Manager, Telecom v.M. Krishnan and others*.³⁴

It is settled law that the law enacted by the Parliament cannot be changed or made useless by judicial interpretation. The provisions of the enactments have to prevail over the judicial decisions. The question of interpretation comes only when the provisions of legislative enactments are either not clear, ambiguous or cannot depict the true meaning. When the provisions of the legislative enactments are plain, clear and unambiguous, then these cannot be negated through judicial interpretation. Reliance can be placed upon various authorities of the Hon'ble Supreme Court of India on this point. The Hon'ble Supreme Court in *State of U.P. & Others v. Jeet S. Bisht & Anr.*,³⁵ has specifically held that court cannot add or substitute word in a statute. By judicial verdict the court cannot amend the law made by the Parliament or State Legislature. It has been further held by the Hon'ble Supreme Court that mere a direction of the Hon'ble Supreme Court without laying down any principle of law is not a precedent. It is only where the Hon'ble Supreme Court lays down a principle of

law that will amount to a precedent. The courts are subordinate to law and not above the law. The very purpose of enacting Consumer Protection Act was to provide simple, quicker and less expensive access to redressal of consumer grievances as otherwise the consumers would have to initiate civil suits that involve lengthy, expensive and time consuming legal process. In effect, this Act can be said to be a special Act passed to protect the interests of the consumers of various sectors.

The Indian Telegraph Act was enacted at a time when there was no mobile/wireless communication and the telephone connections were far and few. In the present age of nearly 900 million subscribers, it is unthinkable that the consumers should go through the process of appointing arbitrators through lengthy legal process. We could not come across any useful information for the consumers on how to appoint these arbitrators. Moreover the relevant section under the Indian Telegraph Act refers to “telegraph line, appliance or apparatus” which obviously does not encompass wireless communication and services relating thereto.

The judgement delivered by District Consumer Forum Ferozepur (President Sri Sanjay Garg) in C.C No.180 of 2009 *Lakhibir Singh v. Aman Arora Telecom & BSNL* clearly explains why Consumer Fora can adjudicate consumer disputes in the telecom sector. Section 25 of Telecom Consumers Protection and Redressal of Grievances Regulations, 2007 clearly recognizes and gives credence to the consumers’ right to seek redressal under the Consumer Protection Act, 1986. Sec. 25(2) of the said regulation goes on to state “Any consumer may, at any time,— (a) during pendency of redressal of his grievance, whether by filing of complaint or appeal, under these regulations; or (b) before or after filing of complaint or appeal, under these regulations, exercise his right conferred upon him under the Consumer Protection Act, 1986(68 of 1986) or any other law for the time being in force and seek redressal of his grievance under that Act or law. Section 3 of Consumer Protection Act, 1986 states “Act not in derogation of any other law – The

provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force". This means remedy available under Consumer Protection Act is in addition to remedy available under any other Act. We hope Consumer Forums will consider the above points before dismissing any telecom dispute on the ground of jurisdiction (lack of) to adjudicate telecom disputes.³⁶

Telecom users can now approach consumer courts directly

For a long time, telecom consumers needed clarity on whether they would need to go in for the lengthy process of arbitration to settle a dispute with a service provider. However, the recent judgement delivered by a consumer court makes it clear that users can go to consumer forums to settle their grievances. Telephone users may no longer need to go through the lengthy process of arbitration to settle a problem with a service provider. They can now directly approach the consumer courts. A recent judgement given by the consumer disputes redressal forum in Mumbai has upheld the maintainability of telecom cases in consumer forums, while taking into consideration the issues arising out of a recent Supreme Court judgment. In a judgement dated 31 December 2009, SP Mahajan, president, consumer disputes redressal forum, central Mumbai district and SS Patil, member, ruled that complaints regarding telephone services can be filed before the consumer forum and need not be referred to arbitration.³⁷

In a significant judgment, the Chandigarh Consumer Disputes Redressal Commission has said cases against telecom service providers can be adjudicated in consumer courts and it is not essential for the complainant to go through the lengthy arbitration process. The decision was passed by Commission president Jagroop Singh Mahal in a case against Vodafone.³⁸

No jurisdiction over BSNL: Consumer court

The South Goa consumer disputes redressal forum held that it had no jurisdiction over a telecom service dispute against Bharat Sanchar Nigam Limited (BSNL) in view of a Supreme Court judgment. However, complaints

against private telecom service providers can be filed before the forum, it stated. While stating that the apex court judgment applies to all pending consumer complaints against BSNL, the forum disposed of six cases against the government telecom service provider pending since 2002.³⁹

Conclusion

The Consumer Protection Act was evolved over the last decade and the judiciary can be credited with keeping consumer protection upto date with the changing times. The Supreme Court and National Commission's decisions in banking, insurance, education and civic services-related cases are now as good as law and have gone a long way in guiding the consumer protection initiative. The distinct roles of the Indian judiciary and the legislature are well-defined. While the governments (or legislature) formulate laws, the judiciary has the job of interpreting them if any disputes arise. The Indian judiciary, sometimes on its own initiative, has changed the conditions of living for Indian citizens. Whether its environmental issues, human rights or consumer concerns like unsolicited phone calls, judicial decisions have had significant impact on how things are run in India. While giving interpretation to the Acts, laws and rules, courts do give due attention to the intention and purpose of the law that pertains to the case in question. In a number of judgements, the Supreme Court has underlined this observation while interpreting the law. A case in point being the *National Insurance Company Ltd v. Laxmi Narayan Dhat*,⁴⁰ the Supreme Court made it clear that the interpretation of the law should be made keeping in view the purpose of the Act. 'A statute being an edict of the legislature, in construing it, it is necessary to seek the intention of its maker', said the Supreme Court. There are situations where the law is silent and facts of the case demand that the meaning of particular clauses be elaborated upon. In such situations, the courts take many factors into account like the circumstances of the case and purpose of the law. This accompanied with the fundamental principle of natural justice is the basis of the interpretation. Such interpretations, when made by the

judiciary, become a precedent for future cases of similar nature and if one can put it that way, they become law.

Indian judiciary has now come to play a very vital role in influencing the various aspects of the administration and governance of the country. At one time, it was thought that the role of judiciary is only to interpret the laws and regulations and provide judgements exclusively from the legal point of view. This perspective regarding the judiciary has undergone sea change in recent times. The indian judiciary, particularly the apex court has done a significant job to protect the rights of consumers. The courts have time and again adopted a flexible approach with regard to cases related to the socio welfare legislations to deliver the justice to the common masses. The same is true with C P Act,1986 also.

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*CONCLUSION
&
SUGGESTIONS*

Many significant developments have taken place in the field of consumer protection in India since, 1984, when legislative measures were introduced to regulate unfair trade practices. Earlier measures, contained in numerous enactments, brought little relief to consumers, in the absence of a unified and effective enforcement agency. The Consumer Protection Act, 1986, has provided an effective organizational structure. The law of consumer protection has substantially developed as a result of successive reforms and a number of decisions handed down by consumer tribunals and the Supreme Court. A number of voluntary consumer organisations, including about a dozen very effective ones, have also emerged in the field. However, there is still a long road ahead. Much depends on how the consumers organize themselves and assert their rights and how effectively the consumer courts function for achieving the avowed objective of delivering speedy and in-expensive justice to consumers. Despite comprehensive legislative measures, and a network of consumer grievance redress agencies and consumer protection councils, fully effective consumer protection is still a distant prospect. There is a heavy backlog of cases pending disposal before the consumer courts, particularly the District Forums, which are taking time much in excess of that prescribed in the CPA, thus defeating the major purpose of setting up of these agencies. Providing consumer justice to large masses is indeed a formidable task. Consumer information and education programmes need to be further strengthened, particularly in the rural areas, which account for about 75 per cent of the total population.

The Consumer Protection Act (COPRA) has succeeded in bringing about fair play in the supply of goods and services to a large extent. The Act applies to almost all goods and services. Still, the present scenario is not very encouraging. Unfortunately the consumer courts have become replica of legal courts, as the

procedure is no longer simple and quick. The consumer redressal process is relatively cumbersome and more expensive and time-consuming than desired. The process involves engaging a professional personnel, requires time for filing the case and attending the court proceeding and certain other formalities like producing the bill, warranty cards etc. These procedures need to be made simpler and quicker for making the process more meaningful and realistic.

Unlike UK, India is not a part of any transnational directive and, it is rather an advantage being independent of any such directive because of the various factors like a vast geographical extent than that of any European countries and the diverse cultural patterns. Unlike UK, there is a comprehensive Act dealing with almost all the matters pertaining to the consumer protection hence it becomes easy for both the manufacturer/seller and the consumer to know the law. Consumer Protection issues are dealt with when complaints are made to the Director-General of Fair Trade. The Office of Fair Trading (OFT) will then investigate, impose an injunction or take the matter to litigation. However, consumers cannot directly complain to the OFT. Complaints need to be made to Consumer Director who will provide legal advice to complainants, or re-direct the individual complaint to Trading Standards for investigation. Due to restrictions within the Enterprise Act 2002, individual complainants are unable to be told whether their case is being investigated or not. In very rare cases, Consumer Director may direct a very large number of complaints to the OFT to be considered as a systemic complaint. However, the remedy available under special Acts in the countries like UK has their advantages as well, since the people are aware about the laws and particularly in their own language, it provides a better and a speedy remedy as courts find it easier to uphold the rights of the consumers under these special Acts.

In India, although implementation of the Consumer Protection Act can be viewed as a success, there are still serious shortfalls in achieving consumer welfare because of the deficiencies in quality infrastructure in the country. First, there is a regulatory deficit in many products and services which impact on the health, safety and environment of the consumers and mandatory standards have not been prescribed for such products as electrical and electronic goods, IT and telecom equipment, industrial and fire safety equipment and toys. There is a multiplicity of regulatory/standardization/conformity assessment bodies and proliferation of certification and inspection bodies. At present, the Quality Council of India (QCI) is the main accreditation body for conformity assessment bodies taking up product or system certification or for inspection bodies, and the National Accreditation Board for Laboratories performs the same function for laboratories. However, there is no compulsion on the conformity assessment bodies, inspection bodies or laboratories to obtain accreditation, thus creating a lack of certainty about the existence of quality products, systems, inspections and laboratories. Laboratory infrastructure is weak in terms of international norms. Quality professionals lack the skills to guide quality improvement efforts in industry. There is apathy among businesses towards standardization in general, and lack of awareness among them about the impact of standards on quality, competitiveness, and profitability. Though, there are ample laws in Australia for the consumer protection, yet the problem of enforcing those rights is still there like India. Unlike India, Australia does not have a large population and the literacy rate is better than that of India. India is not lagging behind in terms of laws as compared to Australia, but it cannot be denied that there is a lot to do in terms of consumer awareness and the better enforcement mechanism as well. No doubt, many NGO's are working in India towards this direction, but

most of them confine their activities to the urban areas, and there are only a few NGO's or activists working in rural areas of India thus a huge chunk of population remains unaware and with the result they do not enforce their rights . There is a need to hold more and more awareness camps in rural areas, which can be done through village panchayats. It should be made an integral part of the activities of village panchayats and help may be taken from NGO's or activists in this regard. There should be an active participation of traders/sellers as well and it should be a give and take process.

One of the major problems with the present telecom policy of India is that it is **anti consumer** in nature. For instance, there are no regulations of telemarketing in India. Telemarketing companies are targeting Indian telecom consumer with all sorts of calls and schemes and department of telecommunications (DoT) India and telecom regulatory authority of India (TRAI) are doing nothing in this regard. Clearly telemarketing lobby is playing with the telecom policies of India otherwise there is no reason why consumers should not be given the amount of fines and penalties imposed upon telemarketing companies. Instead, these fines are collected by the telecom companies that obviously are interested in promoting more telemarketing products and services. Further, there is no effective mechanism through which *telecom disputes* of consumers can be effectively handled in India. Another area of concern is that there is no *privacy law and data protection laws* in India. Essential and private details of telecom consumers are openly available for sale in the markets. Telemarketing companies purchase this information and use the same without any fear of punishment as there are no deterrent rules or regulations in this regard. The consumer protection law of India needs a fine tune. It is high time that India

must formulate effective and proper telecom policy of India. Of course, DoT India and TRAI need to perform the functions entrusted to them instead of supporting telemarketing and rouge telecom companies in order to achieve this task.

The Indian Constitution has charged the judiciary with the primary task of promoting the rule of law. Limiting the power of the political executive; reviewing the rationale of the law made by the legislature; declaring remedies to those who have taken recourse to judicial process – are some of the several facets that judicial enforcement of ‘rule of law’ entails. Rule of law requires the supremacy of law as opposed to the supremacy of the government or any political party. The judiciary, through legal processes, is playing a major role as a catalyst towards the emergence of a new framework of government-business relations. The distinct roles of the Indian judiciary and the legislature are well-defined. While the governments (or legislature) formulate laws, the judiciary has the job of interpreting them if any disputes arise. The Indian judiciary, sometimes on its own initiative, has changed the conditions of living for Indian citizens. Whether its environmental issues, human rights or consumer concerns like unsolicited phone calls, judicial decisions have had significant impact on how things should run in India. There are situations where the law is silent and facts of the case demand that the meaning of particular clauses be elaborated upon. In such situations, the courts take many factors into account like the circumstances of the case and purpose of the law. This accompanied with the fundamental principle of natural justice is the basis of the interpretation. Such interpretations, when made by the judiciary, become a precedent for future cases of similar nature and if one can put it that way, they become law. Indian judiciary has now come to play a very vital role in influencing the various

aspects of the administration and governance of the country. The indian judiciary, particularly the apex court has done a significant job to protect the rights of consumers in general and against telecom industry in particular. The courts have time and again adopted a flexible approach with regard to cases related to the socio welfare legislations to deliver the justice to the common masses. There is a dire need to deliver the speedy justice, so that the object and purpose of the CP Act, 1986 is fulfilled.

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